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Supreme Court of the United States

OCTOBER TERM, 1925.

Nos. 3[redacted]54 55

PAULINE ANDREE DE LA METTRIE and GEORGE PRATT DE GASQUET JAMES,

Appellants,

against

ELIZABETH PRATT DE GASQUET JAMES, THOMAS W. MILLER, as Alien Property Custodian, et al.,

Appellees,

and

DAVID KEANE, Receiver,

Appellant,

against

ELIZABETH PRATT DE GASQUET JAMES, THOMAS W. MILLER, as Alien Property Custodian, et al.,

Appellees.

BRIEF ON BEHALF OF THE APPELLANTS (on both appeals).

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Supreme Court of the United States

October Term, 1925.

PAULINE ANDREE DE LA METTRIE and GEORGE PRATT DE GASQUET JAMES, Appellants, against ELIZABETH PRATT DE GASQUET JAMES, THOMAS W. MILLER, as Alien Property Custodian, et al., Appellees,	No. 346.
and	
DAVID KEANE, Receiver, Appellant, against ELIZABETH PRATT DE GASQUET JAMES, THOMAS W. MILLER, as Alien Property Custodian, et al., Appellees.	No. 347.

BRIEF ON BEHALF OF THE APPELLANTS (on both appeals).

Statement.

There are two separate but related appeals here from judgments of the Court of Appeals of the District of Columbia, affirming decrees of the Supreme Court of the District. *One No. 346* decided March 2nd, 1925 (Record,

pp. 147-145-146, 55 App. D. C., 352), dismissing a suit brought under Sec. 9 (a) of the Trading with the Enemy Act of Congress (41 Stat., l. 977) by Pauline Andree de la Mettrie and George Pratt de Gasquet James, judgment-creditors, plaintiffs, against Elizabeth Pratt de Gasquet James, an insolvent judgment-debtor; and the Alien Property Custodian, and the Treasurer of the United States, defendants (hereafter referred to as the de la Mettrie suit): And the other *No. 347,* a decree made in the court of this District, decided March 2nd, 1925 (Record, pp. 147-148, 55 App. D. C., 354), in a proceeding begun by petition of David Keane, Receiver, denying the application and dismissing the proceedings, with costs (Record, p. 147), appointed by the New York Supreme Court, of the property of Elizabeth Pratt de Gasquet James, against the same defendants, for leave to intervene in the de la Mettrie suit.

Thomas W. Miller, the Alien Property Custodian at the time the suits were commenced was succeeded by Frederick C. Hicks, who was succeeded in turn by the present Custodian Howard Southerland, who has been regularly substituted as appellee herein by order of the court.

The appeals are here under Section 250 sub-divisions Fifth and Sixth of the Judicial Code, they being cases in which (1) the jurisdiction of the trial court was in issue (2) the validity and authority exercised by the Custodian under the Trading with the Enemy Act, and the existence or scope, or power, or duty so exercised in the premises is drawn into question (3) as being cases in which the construction of Section 9 of the Trading with the Enemy Act is drawn into question by the defendants (Assignments of Error, Record, pp. 149-151 and 153-154). The appeals were taken before the amendment of the Judicial Code by (Public, No. 415-68, Congress) approved February 13th, 1925 which went into effect three months later May 14th, 1925. The appeals were allowed March 21st, 1925 (Record, p. 155).

Jurisdiction was entered and on a similar appeal as matter of right by this court in the Banco Mexicano v. The Deutsch Bank and the Alien Property Custodian (263 U. S., 591).

The suit, which is in equity, was commenced in May, 1921 by the plaintiffs as judgment-creditors, against Elizabeth Pratt de Gasquet James, judgment-debtor, and the Alien Property Custodian, and Treasurer of the United States, to apply certain property of the judgment-debtor (acquired from her father), which had been sequestered by the Custodian in the hands of the Farmers' Loan & Trust Company in the City of New York, on May 29th, 1918, to the satisfaction of a judgment of the Surrogate's Court of Ulster County, New York, rendered in favor of the plaintiffs against the defendant James in March, 1915, and reentered in on November 3rd, 1917 upon its affirmance on appeal by the New York Court of Appeals, which court retained jurisdiction of the case at the time of the capture, for the purpose of enforcing its decree by order and execution, and in the absence of the judgment-debtor from America.

The judgment-debtor, Madam de Gasquet James (an American woman born in the United States of American parents) had in 1912 married the Duc de Mecklenburg, Schwerin, a German citizen and cousin of the then German Emperor.

On May 29th, 1918, her property and interests in question (which was part of her separate estate at the time of her marriage) in the hands of the Farmers' Loan & Trust Company in New York, consisting of securities, a life estate in the income of a self-created trust of $135,000, and a large amount of accrued income, were sequested as enemy property, and removed from the state and from the reach of the process of the New York courts; the income of the trust continuing to be collected by the trustee for the account of the custodian down to the present time.

The judgment-debtor James had made application on December 24th, 1920, and filed her claim with the Custodian for the return of the sequestered property to herself (Stipulation 13, Record, p. 72) under the provision of the amendment of the Act of June 5, 1920, Sec. 9 (b) 31-8 *which permitted the return of sequestered property, to* * * *

> "(3) A woman who at the time of her marriage "was a citizen of the United States, said citizenship "having been acquired by birth in the United States "and who prior to April 6th, 1917 intermarried with "a subject or citizen of Germany or Austria-Hungary, "and that the money or other property concerned was "not acquired by such woman either directly or in- "directly from any subject or citizen of Germany or "Austria-Hungary."

The sequestration was about to be lifted, and the property, consisting of securities and accumulated income then amounting on January 1st, 1921 to $21,600 (see Record, p. 141) and now amounting to upwards of $55,000, was about to be turned over to the judgment-debtor as alleged, beyond the State of New York in avoidance of her judgment-creditors, by the Custodian—shortly before the commencement of the present suit, which stayed the prospective delivery.

> Record, page 42, folio 74—Note typographical error May 26th, "1922" should be *1921* (not denied) and stipulation 13, Record, page 72.

Preliminary to the trial, a motion was made by the defendants for judgment dismissing the complaint for want of jurisdiction in the court, of the subject matter of the suit, which was denied after hearing by Judge Hoehling on October 20th, 1921, with leave to defendants to answer (Record, p. 13). This order was never appealed from.

The defendant, Madam James defended the suit upon the grounds:

1st. That the plaintiffs being French citizens, the court had no jurisdiction of the action, for the reason, that being such, it was essential, that the Trading with the Enemy Act, Section 9 (e) as amended, June 5th, 1920, that their claim must arise *"with reference"* to the sequested property; which, the trial court and the Court of Appeals, construing the Act, *held* it did not, Record (Answer, p. 15, fol. 26). The section is as follows:

> "Section 9 (e) No money or other property shall be returned nor any debt allowed under this section to any person who is a citizen or subject of any nation which was associated with the United States in the prosecutions of the War, unless such nation in like cases extends reciprocal rights to citizens of the United States; nor in any event shall a debt be allowed under this section unless it was owing to and vowed by the claimant prior to October 6th, 1917, and as to claimants other than the United States unless it arose with reference to the money or other property held by the Alien Property Custodian or Treasurer of the United States."

The Custodian and Treasurer defended upon the grounds:

That the Supreme Court of the District was without jurisdiction of the subject matter of the suit, because:

(1) The debt sought to be recovered by the plaintiffs was neither owing nor owned by the plaintiffs prior to October 6, 1917, and

(2) The plaintiffs were not citizens of the United States and the debt which they are seeking to recover did not

arise "with reference" to the money or other property held by the Alien Property Custodian or the Treasurer as required by Section 9 (e) of the Trading with the Enemy Act (Answer of Custodian, Record, p. 12, fol. 19).

The Government's first ground of objection, to the jurisdiction of the District Court that the claim did not arise prior to October 6th, 1917, was apparently abandoned at the trial, for it was made clearly to appear that the judgment of the Surrogate's Court of Ulster County, N. Y., was made and entered March 21st, 1915; and that the subsequent judgment of November 3rd, 1917, was entered anew on an affirmance of the original drawn of 1915 by the Court of Appeals, with an unimportant modification (Plaintiffs' Exhibits III and IV, Record, pp. 59-60).

The Government, however, insisted upon its two other defenses:

(1) That France had not accorded reciprocal right to American citizens, which under the Act, it claimed, was necessary to give jurisdiction; and (2) that the claim did *not* arise "*with reference*" to the sequestered property, as that phrase was used in Sec. 9 (e) of the Act.

As to the want of jurisdiction resulting from the alleged failure of the French Government to accord reciprocal right, a preliminary question of fact arose and was tried as determinative of the jurisdiction, on this issue:

> First National Bank v. Chicago T. & T. Co., 198 U. S., 389;
> Bordes v. The Bank, 178 U. S., 524.

It resulted in the courts excluding, under exception, on the objection of the government, the evidence of the accord of reciprocal rights by the French Government, in an official communication to the American Secretary of State from the French Government, transmitted through the French Embassy of Dec. 11th, 1922.

See communication French Ambassador (Plaintiffs' Ex. XI for Identification, Record, pp. 62-63, Ruling of the Court, p. 62, fol. 13 and pp. 136-137).

But, as will subsequently appear, this communication afterwards became incorporated in the evidence in the deposition of defendants' expert witness Pierre le Paulle, and this particular defense sank into desuetude; and the case was decided by the Court of Appeals on the ground that the plaintiffs' claim did not arise "*with reference*" to the sequested property in the hands of the Custodian and Treasurer, on the authority of the Banco Mexicano case (53 App. D. C., 266; affd. 263 U. S., 591) (Opinion, Record, p. 146).

The Receiver's Intervention.

During the progress of the suit the New York Supreme Court on June 18th, 1923 appointed David Keane, Esq., Receiver of the property and equitable interests of the defendant James, and directed him to apply to the Supreme Court of the District of Columbia to intervene in the pende lite de la Mettrie suit (Record, pp. 36-43).

The Receiver's position was entirely different from that of the plaintiffs, in the important respect that he being an American citizen, and an officer of an American court, did not come within the provisions of such Section (e) of Section 9; and was not therefore required to show that his claim arose before October, 1917; and arose with reference to the sequestered property; and that France had accorded reciprocal right to the American citizens, which applied to French citizens and alien allies in their position, but not to American citizens; and the technical objections which both the defendants relied upon in defending this suit would be avoided, by the Receiver's intervention.

The Receiver's application made upon petition to the District Court, during the progress of the trial for leave to intervene, was denied by the trial court of its own motion, without other reason given therein is to be found in the following language:

> "I shall deny the motion for leave to intervene and you may have an exception" (p. 64, fol. 114).

A motion was at the same time made by the plaintiffs on their own behalf, to have the Receiver as successor in interest to the judgment-debtor James, brought in and made a party to the suit, which was denied and exception allowed (Record, p. 64).

The Court of Appeals sustained the final order of denial upon the express ground, of its construction of sub section (f) of Section 9 of the Act (Opinion, Record, p. 147; Judgment of Affirmance, p. 147) *holding* that sub-section (f) precluded the New York Receiver from any intervention in the matter, even in the equity suit, provided by Section 9 (a) of the Act; and that such an intervention would be in derogation of the provisions of sub-section (f), which is as follows:

> "Section 9 (f). Except as herein provided, the money or other property conveyed, transferred, assigned, delivered or paid to the Alien Property Custodian, shall not be liable to lien, attachment, garnishment, trustee process, or execution, or subject to any order or decree of any court."

Several other questions of importance upon exceptions to the exclusion of evidence bearing upon the main issues, as appears by appellants' assignment of error hereafter to be noticed.

The Appellants' Contentions.

The appellants in (No. 346) contend:

(1) That it is important to consider the first instance, this is *not* in effect a suit against the United States affecting its title to sequestered property, the disposition of which Congress has not determined upon as yet, as in the Banco Mexicano case (263 U. S., 591) from which it is distinguishable in this respect, but is in fact, a suit under the Act, in the nature of a creditor's bill against the real defendant in interest, Elizabeth Pratt de Gasquet James, a judgment-debtor, to determine who shall be entitled to this property on its release, *whether* the absentee judgment-debtor, who is striving to elude her judgment-creditors by having the sequestered property released and turned over to her or her agents, outside the State of New York and beyond the reach of the process of the court which rendered this judgment against her, and retained jurisdiction to enforce it against all her property in this State; and whose laws forbid its removal by her for the purpose of evading her creditors? Or the plaintiffs, by the direct award of the court? Or the New York Receiver of the debtors' property? Or the Farmers Loan & Trust Co. in the City of New York from which the *possession* was wrested, as a precautionary war measure, eight years ago?

The appellants contend that their claims to this property (the Government appropriation of which Congress has disclaimed, and provided for its release) and of the right to have it applied to their judgments, or turned over to the Receiver. Or restored to the Trust Company in the jurisdiction in which it was captured, and the *status quo anti sequestration* restored; and thus prevent its delivery to the judgment-debtor in fraud of her creditors, *does constitute a claim* "with reference" to this *particular*

sequestered property, upon any broad and reasonable construction of the Act.

(2) That if it is not conceded as fully proven—*which the appellants contend it was*—that the Government of France accorded full reciprocal rights to American citizens, so as to give the court of the district jurisdiction of the cause, that the failure to establish such jurisdictional fact was due to the wrongful exclusion on the Government's objection, of the official communication of the French Government of December 11th, 1922 to the American Secretary of State (Plaintiffs' Exhibit XI, recd. pp. 62-63; Finding and Ruling, pp. 136-137; Memorandum, p. 143, fol. 243); as well as to give proper effect to the uncontradicted evidence of the expert witnesses called by the Government and the plaintiffs, as more fully specified in Appellants' Assignment of Errors (5).

(3) That the plaintiffs' motion at the trial to bring in David Keane, Receiver of the property and equitable interest of the judgment-debtor, James, appointed by the New York Supreme Court, subsequent to the commencement of the suit, and as successor to the said defendants' interests in the sequestered property, was improperly denied as (Record, p. 64).

(4) That other evidence bearing upon the main issues of jurisdiction and the powers of the custodian under the Act were improperly excluded as more particularly appears in Appellants' Assignment of Errors.

In (No. 347) the Receiver contends that the courts below improperly denied his petition to intervene in the suit as the successor in interest of the defendant judgment-debtor James, upon the ground that he was excluded from intervention in the suit by the provision of Section 9 (f) of the Act, and that the said provision was improp-

erly construed by the trial court, and the Court of Appeals of the District. And that the protection thrown around the *possession* of sequestered property in the hands of the Custodian and Treasurer by sub-division (f) of Section 9 is from proceedings other than those authorized by the Act, and is intended to relegate claimants to the remedy of suit in equity as provided in Section 9 (a), and has no other purpose. (Fisher v. Palmer, D. C., 259; 259 Fed., 355, citing Haycroft v. U. S., 39 U. S., 81; Wells v. Roper, 246 U. S., 336.) And that the Receiver standing in the shoes of the judgment-debtor James, respecting the reclamation of her sequestered property from the Custodian, for which she had made application December 24th, 1920, was not in respect of his application to intervene in the suit, within the prohibitions of the sub-section; and that the affirmance of the decree denying his petition to intervene by the Court of Appeals of the District was error.

Upon Both Appeals.

The case presents the larger, and most important question which is— Can the Trading with the Enemy Act be so construed as to create a means, in the form of law, by which an insolvent absentee judgment-debtor, whose property has been sequestered and rendered *immune* from process if the courts of state which rendered the judgment, and where the property was located at the time of the capture, can procure its release and delivery to the debtor in another jurisdiction, and thus elude her judgment-creditors and the Receiver of her property, through the instrumentality, and under the protection of the Act, without recourse by the aggrieved parties to the courts of justice, and particularly the court of equity designated by Section 9 (a) of the Act; and with entire impunity from judicial restraint. And if so does it constitute due process of law within the meaning of the Constitution?

The construction of the Act upon which the courts below renounced jurisdiction of the cause, and dismissed the complaint, left the appellants without any remedy for the Act took from them the right to seek relief in any other court; and made the rejection of the claim, and the allowance of the defendant judgment-debtor's claim to restitution absolute.

The protection of the creditors from the fraudulent removal of property by debtors in avoidance of judgments is provided for by the New York Code of Civil Procedure as follows:

> "SECTION 1171: A person who with intent to defraud a creditor, or prevent any of his property being made liable for the payment of his debts, or levied upon by execution or warrant, removes any of his property or secretes, assigns, conveys or otherwise disposes of the same; or with intent to defraud a creditor * * * removes * * * any of his books * * * is guilty of a misdemeanor.
>
> SECTION 27: *All principals in misdemeanors.* A person who commits or participates in an act, which would make him an accessory if the crime committed were a felony, is a principal and may be indicted and punished as such, if the crime be a misdemeanor.
>
> SECTION 26: *Principal and Accessory.* A party to a crime is, either
>
> 1. A principal; or
>
> 2. An accessory.
>
> SECTION 2: *Principal.* A person concerned in the commission of a crime whether he directly commits the act constituting the offense or aids and abets its commission, and whether present or absent, and a person who directly or indirectly counsels, commands, induces or procures another to commit a crime is a principal.

SECTION 1936: *Punishment of an Accessory to a Misdemeanor.* When an act or omission is declared by statute to be a misdemeanor and no punishment for aiding or abetting in the doing thereof is expressly prescribed, every person who, aids or abets another in such act or omission is guilty of a misdemeanor."

Such are the comprehensive provisions of the New York Penal Law which seek to prevent the fraudulent removal of property by a debtor from the reach of creditors.

The removal of the property in the present case, in the first instance, was, to be sure, *involuntary,* so far as the debtor was concerned, and accomplished under sanction of an over-reaching and dominant war measure *force majeur.* And it may be conceded that the delivery of the property or so much of it as is now actually in Washington to the judgment-debtor (who has not been in America for 13 years), out of the State of New York, would not constitute a crime committed within the State under these Sections of the Penal Code—all of which would seem to point to the reasonableness of that construction of the Trading with the Enemy Act, which would give to the court designated by Section 9 (a) power to prevent such an unforeseen travesty upon justice, as would result from denying this court the power to recognize the New York Receiver, if not the plaintiffs, and require the property of the judgment-debtor to be handed over to him, and brought again under the jurisdiction of the New York courts, and the property secured to this creditor—for if the complaint stands dismissed the property will be turned over to the judgment-debtor under the allowance of her claim, alleged and not denied, to have been already granted and the laws of the State of New York successfully evaded.

It may be noticed that the Custodian was fully advised of the claims of the creditors and the Receivers. And that it was admitted that the judgment-debtor had filed her claim for restitution of the property under the amend-

ment of June 5, 1920, as early as Dec. 24, 1920. And that it was alleged, and although not formally denied sought to be proven, that her claim had been allowed by the Custodian and was about to be turned over to her when the present suit was commenced staying the Custodian (Record, p. 39). And that when plaintiffs attempted to prove this fact by the records of the Custodian and Attorney-General in court, that the Assistant Attorney General vigorously opposed the same, and refused to testify as to the payees in his possession; and the proof offered was excluded by the court on the ground of *privilege* (Record, pp. 64 to 68).

So that the purpose of the Custodian to turn the property over to the judgment-debtor seems not to be left in doubt. This phase of the case is noticed later.

The case is of more than individual interest, and has an international importance, as affecting the friendly and reciprocal relations of the American and French Governments in adjusting the rights of these citizens in property sequestered by the respective Goverments. The matter of the recognition of the claims of Countess Pauline Andree de la Mettrie and George Pratt de Gasquet James, has been the subject of quite extensive diplomatic correspondence culminating in the communication of Dec. 11th, 1922 by the French Government, to the American Secretary of State, through Ambassador Jusserand (Record, pp. 62-63); and has a distinct and practical bearing upon the claims of American citizens prosecuting claims to sequestered property in France.

The main issues involved in the two appeals to which the other questions presented, are subsidiary, then, are:

No. 346.

(1) In defining the issues—is the suit, *in effect* one against the Government of the United States, which it is the duty of the Custodian and Treasurer to defend as they

are doing, in the supposed interests of the Government; or is it rather, in substance and effect, against the judgment-debtor, James as the real defendant in interest; since Congress has declared its purpose to restore the sequestered property of American women in her situation? And is not the proper and legal attitude of the Custodian in the suit that of a mere Custodian of the property, or that of a disinterested stakeholder?

(2) Has the French Government accorded reciprocal right to American citizens as shown by the evidence offered in this suit—if that question be still regarded as in the case since the decision of the Court of Appeals?

(3) Do the plaintiffs' claims arise "*with reference*" to the sequestered property within the meaning of the Act, Section 9, sub-sec. (e) and was error committed by the Court of Appeals in affirming the decree of the trial court dismissing the complaint on the ground that this claim did not so arise?

(4) Was the denial by the trial court of the plaintiffs' motions to have the New York Receiver of the defendant James' property, choses in action, and equitable interests, brought in and made a party to the suit. Error which required the reversal of the decree by the Court of Appeals affirming the decree dismissing the complaint?

(5) Errors arising on exceptions to rulings on exclusion of evidence.

No. 347.

(6) Was the petition of the Receiver for leave to intervene in the suit, properly denied by the trial court and properly affirmed by the Court of Appeals upon the construction of sub-section (f) of the Act adopted by it, holding that the Receiver was precluded by the same from being made a party to such equity suit brought under the provisions of Section 9 (a) of the Act, and the court from ordering such intervention?

Assignment of Errors Urged.

I. The Court of Appeals erred in affirming the decree of the trial court holding that the plaintiffs' claim to recover the amount of their judgment with interest out of the sequestered property of the defendant James, judgment-debtor, and for other relief, do not arise "with reference" to the sequestered property within the meaning of the Act as amended, June 5th, 1920.

II. The Court of Appeals erred in affirming the decree of the trial court, holding in effect that to entitle the plaintiffs to any of the relief prayed for, it should show, but was not shown, that there was a specific lien upon the money or property, to bring the case within the provisions of the Act, Section 9 (e) as amended June 5, 1920.

III. The Court of Appeals erred, holding in effect with the trial court, that the rights of the plaintiffs as judgment-creditors of the judgment-debtor James, under the laws of the State of New York, upon the facts alleged in the complaint, to collect their judgment out of the assets of the judgment-debtor, in that state, and to prevent the removal of those assets by her from the state, and to prevent the collection of their said judgment out of such property, were not remedies which gave such security for the judgment as attached to the property in the hands of the Alien Property Custodian, so that the plaintiffs' claim within the meaning of the act arose "with reference" to the property held by the Custodian.

IV. The Court of Appeals erred in holding, that the application made upon the petition of the Receiver of the New York Supreme Court, David Keane, to intervene as successor in interest to the rights of the judgment-debtor, defendant James, to all her sequestered property and interests in the hands of the Custodian and Treasurer; and on the motion of the plaintiffs to join him as defendant in the action, were properly overruled and denied, as matter

of law, upon the ground that sub-section F of Section 9 of the amended Act of June 5th, 1920, precluded the Receiver's intervention as the successor in interests of the right of the judgment-debtor, defendant, or otherwise, upon his own motion or that of the plaintiffs.

V. That the Court of Appeals erred in refusing to consider the other questions raised on the appeal from the final decree and final order of the Supreme Court of the District, filed December 5th, 1923, including the following errors (specified in the Assignment of Errors, Record, pp. 150-151) in excluding evidence offered.

(b) In holding that the French Government did not extend full reciprocal rights to the American citizens in the courts of the French Republic to those granted to French citizens in the courts of the United States in respect to claims of sequestered property.

(c) In excluding certified copies of the official communication of the French Government to the American State Department, to the French Embassy at Washington, dated December 11th, 1922, in a translation of the Department of State (Plaintiffs' Exhibit 11 for identification, Record, pp. 62-63).

(d) In denying the plaintiffs' motion to amend the Bill of Complaint for the purpose of adding David Keane Receiver of the New York Supreme Court as a co-defendant in the suit.

(e) In excluding without examination by the Court, or allowing the same to be marked, and refusing to allow them to be offered in evidence, documents produced in court by the Attorney General under stipulation with the plaintiffs' counsel, in lieu of the subpoena duces tecum. (a′) the claim filed by the within judgment with the Custodian on December 24th, 1920, (b′) All papers produced in court from the file of the Custodian and Attorney General's office under stipulation, and contained in a bundle;

(c′) All letters addressed and sent to the Alien Property Custodian and Treasurer relating to the claim filed by the defendant James; (f′) In refusing to allow the Assistant Attorney General to produce the above mentioned papers in court, and had them in his possession, to be sworn as a witness when called by the plaintiffs' counsel to the stand; (g′, h′, i′, j′, k′) In excluding the laws of the State of New York, specifically mentioned in the Assignment of Errors (Record, p. 151; (l′) In excluding certified copy of the judgment of the United States District Court, Eastern District of New York, in the case of Charles S. Aramstrom v. Elizabeth Pratt de Gasquet James and the Alien Property Custodian, et al. (Plaintiffs' Exhibit 13 for identification); (m′) In excluding the account of the defendant James, filed in the Surrogate's Court of Ulster County, New York on April 17th, 1913, which is the basis of the plaintiffs' judgment in the present suit; (n′) In excluding Plaintiffs' Exhibit 13 (Record, pp. 141-142) after the same had been previously admitted, and refusing to allow the Assistant Attorney General to produce the paper and to be examined under oath as to the same.

VI. Court of Appeals erred in holding in effect that plaintiffs-appellants, did not set forth and prove facts sufficient to entitle them to equitable relief, under Section (a) of the Act.

VII. Court of Appeals erred in affirming the final decree of the District of Columbia, and the final order, dismissing petition of the Receiver, with costs.

VIII. Court of Appeals erred in entering the final decree, December 17, 1923, affirming the decree of the Supreme Court of the District of Columbia with costs, and final order denied the petition of the Receiver of the New York Supreme Court to intervene in the action.

ARGUMENT.

(No. 346)

POINT I.

The claims of the plaintiffs-appellants arose "with reference" to the specific money and property held by the Alien Property Custodian and Treasurer of the United States, within the meaning of the Trading with the Enemy Act, Sec. 9; as well as in fact; and the Court of Appeals of the District erred in affirming the judgment dismissing the complaint, on the ground that the claims did not so arise.

As a matter of fact it is too obvious to admit of discussion, that the claims of the plaintiffs were of a right to, or in, this particular property—and nothing else. They claimed that this, the property of an insolvent judgment-debtor against whom a New York court had awarded them judgments, and which that court was endeavoring to enforce against this very property of the debtor within the state, when it was sequestered and removed from the reach of its powers, should be applied by the Supreme Court of the District of Columbia having exclusive jurisdiction of its application, under the Act, to the satisfaction of their judgments either directly; or by transferring it to the New York Receiver; or returned to the Farmers' Loan & Trust Company from which it was taken; and restored to the jurisdiction of New York when released by this Government; and to restrain its delivery to the absentee judgment-debtor, which was about to take place, in avoidance of their New York judgments.

Whatever the grounds upon which these claims were urged, whether sound or unsound, they all related to this property, and arose "with reference" to it, unless the ordinary and accepted meaning of language is to be disregarded and logical deductions ignored.

Whether legal interpretations can produce a result so at variance with common sense and the rights of judgment-creditors as does the construction placed upon this provision of the Act by the courts below, is the question.

The argument upon which the construction of the learned courts below is sought to be upheld, is that a claim cannot arise with "reference to" the property of the judgment-debtor in the hands of the Custodian sought to be reached in the suit by the judgment-creditors, unless the debt "has *fixed* some right, or title, or equity to the money or other property in the hands of the Alien Property Custodian;" and, "left some ear marks upon it," which it is urged this judgment-debtor has not in the instant case. That is that claims can only arise under this section with reference to *ear marked property.*

But the statute imposes no such qualifications upon the right conferring jurisdiction. The language of the Act is broad and simple, and, without restrictions upon the kind of claims, that the claims thus made shall arise with reference to the property held by the Custodian. It does not even require that it shall arise *out of*, but only, "*with reference to.*"

The appellant does claim, however, that an equitable lien, attached to the property when taken over by the Custodian, and removed from the jurisdiction of the New York court which was pursuing in satisfaction of its judgments.

The learned Court of Appeals, considered that it was bound by its decision in the Banco-Mexicano case (55 D. C., 354, 6 Fed. [2d], 479), affirmed by this court in (262 U. S., 591), and it decided the appeal in this case (No. 346) on the authority of that case, without distinguishing it.

It is a fundamental principle of the rule of judicial precedent as declared by Chief Justice Marshall, that, "the positive authority of a decision is co-extensive only with the facts upon which it is made."

Ogden v. Saunders, 12 Wheaton, 333.

The *Banco Mexicano* case arose out of a claim upon a common debt, made by a Mexican bank for money loaned by it in the City of New York to one of the great German banks during the war, and which was on deposit to its credit in a New York bank at the time it was seized in December, 1917, by the Custodian, as enemy property. It was therefore at the time of its seizure, out and out, enemy property, unmistakably impressed with the hostile character of its belligerent owners' nationality, and available, until its seizure, for the hostile purposes of the German Government in America, which it was the very purpose of the act to prevent, as the opinion points out.

The District Court held that the claim being a *mere common debt*, not reduced to judgment, creating no lien upon the sequestered fund in the hands of the Custodian, *and the claims of the Government of the United States against it for possible damages, etc., not having been determined as yet by Congress*, that it was not a proper claim against the Custodian to be enforced by the courts in the present condition of the law, and that it *was the duty of the Custodian to defend his possession until Congress had determined what the United States Government would do with the property.* The court placed its decision ultimately upon the technical ground that the claim did not properly arise "with reference to" the property in the hands of the Custodian within the meaning of the Act under the particular circumstances of the case.

It would seem to go without saying that the broad and elastic statutory phrase *"with reference to"* can in no case be construed and applied, except in connection with the particular facts of a given case, as the court in its opinion is careful to make clear. The language was advisedly used in the Act with a view to its susceptibility to varied application, as justice and expediency in particular cases might require, leaving a large discretion to the tribunal administering the law in applying it. *"With reference to"* as used in the Act is not a hard and fast term of

mathematical precision, but one of loose and general description, equivalent in common usage to the interchangeable phrases, in *relation* to, in *respect* to, and in *regard* to. (See Century Dictionary.) There is nothing contrary to this in the decision of the U. S. Supreme Court when the opinion is carefully read. What then are the facts in the *James* case which distinguishes it sharply from the *Banco Mexicano* case, and bring it within the terms of the Act?

(1) The Deutsche Bank was a German national having its principal office in Berlin, a formidable financial instrument or agent of the German Government—German in origin, sympathy and hostility.

Madame James on the other hand was an American-born woman and citizen who some years before the war had married a German citizen who after the commencement of the war is said to have divorced her. She was at most a technical alien enemy under the Act, and the property sequestered was her separate estate. The distinction is obviously important in construing and applying the Act with reference to its objects.

(2) Congress has not yet declared what disposition it will make of the sequestered property of German citizens *generally;* or what claims it will require to be satisfied out of it; such as the claims of American citizens arising out of the sinking of the Lusitania and other damages inflicted upon them before and after the United States entered the war. Such sequestered property still retains the character of enemy property in the hands of the Custodian and is still the property of the United States, to do with as it will. Not so, however, as to Madame James' property which was placed in an entirely different category by the amendment of June 5, 1920, to Section 9 (b-23) Congress then declared its purpose with respect to the *repatriation* of the sequestered property

of American women who had married foreign subjects, including Germans, and conferred the power upon the President acting through his representatives to return such sequestered property to them on proper application and proof. And the Custodian acting under this authority and upon the advice of the Attorney General in May, 1922, was proceeding to allow Madame James, the judgment-debtor's claim to the restoration of her sequestered property, if he had not virtually or formally allowed it as the plaintiffs offered evidence to show that it had, which was excluded on the ground of *privilege* (see Assignments of Error, 5 Sub. e and b. Record, pp. 150-151); and it was about to be turned over to her as plaintiffs apprehended in Europe when the suit of Countess de la Mettrie and her brother, Count de Gasquet James, was begun in the Supreme Court of the District of Columbia, and the payment to the judgment-debtor stayed; and thus far prevented from diversion from her judgment-creditors in the State of New York.

The immediate release of $10,000 of income of all of such funds by the Custodian was further provided by the amendment of March 4, 1923 (see Secs. 3 and 23).

There is, therefore, no claim made to this property by the Government of the United States. And it follows, of course, there can be no proper contest between the United States and the judgment-creditors of Madame James, who were prevented from satisfying their judgments out of it by the seizure of the property by the Custodian and their proceedings stayed. All the Government would appear to be properly interested in is the return of the property to those having rightful claim to it through Madame James.

The concluding language of the opinion in *Banco Mexicano* case is that "*It is the duty of the Custodian to defend his possession according to law until Congress has determined what disposition it will make of the property*" has no application to the *James* case, since Con-

gress *has* declared what disposition is to be made of the sequestered property of American women marrying foreigners in Madame James' situation.

And it was upon this ground, as we read the opinion this this court affirmed the dismissal of the complaint (263 U. S., at p. 234).

(3) Another important distinction between the two cases is the fact dwelt upon with so much emphasis in the District Court's opinion in the *Banco Mexicano case*—that the Mexican bank *had not obtained a judgment* against the German bank, and was at most a common creditor of the latter. This the court regarded as an infirmity of the *Mexican Bank* case, which placed it outside of the provisions of the Act respecting the debt-claim of aliens. The opinion said:

> *"This is a plain case of debtor and creditor between the German and Mexican banks."*

In the *James* case the judgment was rendered in 1915 against her for a failure to turn over trust funds, and was sustained on appeal by the highest court of the state.

(4) The opinion further refers to the fact that:

> "There is nothing to indicate that the contract between the two banks (the Mexican bank and the German bank) which placed any limitation upon the disposition which the German bank might make of the borrowed money after it was delivered. It was free to send the money out of the country * * *. The transaction imposed no duty upon the German bank *either contractual or moral, or by commercial custom*, except to pay the loan when due according to law."

This is of especial importance in view of the express purpose of the Act, which was to prevent German money and property from fighting for Germany.

But the case of Madame James is far different in this as in other respects pointed out. The money and property sequestered was not borrowed or acquired by her during the war, but had constituted part of her separate estate inherited from her father, Colonel George Washington Pratt, out of which she had created a voluntary trust for her own benefit for life in the Farmers Loan & Trust Company of New York in 1887. At the time the property was seized by the Custodian in March, 1918, and subsequently, there was outstanding and unpaid a judgment of the Surrogate's Court of Ulster County, N. Y., surcharging her account of executrix of an estate which was under administration in that court, for funds of the estate withheld by her, which belonged in part to the plaintiffs-judgment-creditors, and which the Surrogate's Court retained jurisdiction to collect, by execution, and has ever since been endeavoring to collect. (*See Central Nat. Bank* v. *Stevens*, 169 U. S., 432; *Louther* v. *Louther*, 115 N. Y. App. Div., 307.)

Madame James, the judgment-debtor, therefore—unlike the Deutsche Bank—was not only under a moral and legal obligation not to remove her property from the State of New York to avoid her judgment-creditors, but was forbidden so to do or attempt to do, as all persons were forbidden to assist her in so doing, by the laws, civil and penal, of the State, such acts constituting a crime under Sections 1173-4, etc., of the New York Penal Code.

We understand that the decision in the *Banco Mexicano* case is regarded by Madame James, if not by the former Attorney General, as an authority, authorizing the Custodian to do for her what she cannot do for herself without commiting a crime under the laws of the State of New York, by removing her property from the reach of her creditors by, first, seizing it under the Trading with the Enemy Act; second, staying the creditors by such seizure; third, awarding under the Amendment of

June 5, 1920, restitution of the sequestered property to her directly, she being and residing permanently in Europe; and fourth, by throwing the plaintiffs out of court in the pending action, under the Act, in the District of Columbia, upon the ground that their claim for this interference with the collection of their judgment out of this property, *does not arise with reference to such property.*

If there was an established right to collect the judgment out of any property of the judgment-debtor within the jurisdiction of the court that rendered it; and that right was obstructed in its exercise by the seizure of the property by anybody, it gave rise to a claim of some sort; and if the claim did not arise with reference to property seized it is difficult to state or imagine what it did arise with reference to.

A judgment is something more than a common debt; it is a super-debt or claim to which the immediate right of collection out of the judgment-debtor's property attaches, and the enforcement of which is guaranteed by all the power of the State. So subject is the property of the judgment-debtor to the judgment that it is made a crime, as shown above, to remove it or to assist in removing it from the reach of creditors of the State for the purpose of avoiding their claims. The Penal laws upon this subject are set forth in the preceding Statement.

It is not conceivable that Congress ever intended to immolate the rights of judgment-creditors and State laws upon any narrow and rigid construction of the phrase "with reference to" occurring in the Trading with the Enemy Act, which had no reference to its declared Post War policy in respect to claims of this character.

The opinion in the Banco-Mexicano case, seems to recognize this limitation upon its construction of the Act, when it says:

> *"There are conceivable instances where a plain case of debt might arise with reference to the money or other property taken over by the Custodian."*

The examples suggested by the court are not exclusive, and do not limit the comprehensive nature of the exception.

It may be observed in passing that the court holds that "the word debt is used indifferently in those provisions to designate the obligation of the debtor and the claim of the creditors." Banco-Mexicano Case (55 C. D.) Miller v. Robertson (266 U. S., 243).

The proceeding in the Surrogate's Court of Ulster County, N. Y., was not terminated but was still pending at the time the property was seized.

In the *Central Nat. Bk.* v. *Stevens* (169 U. S., 432) the Supreme Court said:

> "But it has been frequently determined by this court that the jurisdiction of a court is not exhausted by the rendition of the judgment but continues until the judgment shall be satisfied. Thus it was said in *Riggs* v. *Johnson County*, 6 Wall., 186, 'that process subsequent to judgment is as essential to jurisdiction as process antecedent." And in *Army* v. *Supervisors*, 11 Wall., 136, it was said: 'An execution is the end of the law, it gives the successful party the fruits of his judgment (*U. S.* v. *Nourse*, 9 Pet., 8, 28).' But it is scarcely necessary to quote authorities to show that to deprive a court of the power to execute its decrees is essentially to impair its jurisdiction. *Juris effectus in executione consistit.*"

Wegan v. Childs, 41 N. Y., 159, *holding* that a suit is still pending whether it has proceeded to final judgment or not, provided any further judicial may be required in the suit.

Louther v. *Louther*, 115 App. Div., 307 (N. Y.), holds that an action will not be deemed terminated until judgment is satisfied.

Can a Court of Equity disregard the continuing jurisdiction of the Surrogate's Court to enforce obedience to

its decree and the inchoate right of the judgment-creditors in the property of the judgment-debtor, in decreeing the disposition of the seized property in the hands of the Custodian and Treasurer, by holding that their claims against it do not arise with reference to the property?

The judgment (which is a perfected debt) carries with it the right to collect it out of the property of the judgment-debtor. They are practically inseparable. When you interfere or prevent the collection of the debt the cause of action arises out of the debt and the interferences with its satisfaction out of the particular property to be reached—at least "with reference" to it. *In the Banco-Mexicano case there was no judgment*, which was emphasized in the Opinion of the court and the Supreme Court.

This would seem to constitute a claim against the property in the nature of an equitable lien, which the Court of Equity of the District could recognize and enforce, if it was necessary to its jurisdictions.

Part of the sequestered property in the case at bar was a voluntary trust, which was not subject to execution, but after return of executions unsatisfied, could be reached by a judgment-creditor's action.

Schenck v. *Barnes* (156 N. Y., 316) puts this question at rest in New York. *It holds* that a person cannot place his property in trust with remainder over receiving a beneficial interest for life, and thereby put the life estate beyond the reach of his creditors.

Whittmore v. *Equitable Trust Co.*, 162 App. Div., N. Y., 607;
N. Y. Code C. P., Secs. 2463-1391;
Gilman v. *McArdle*, 99 N. Y., 451.

The issuance of executions and their return unsatisfied was a necessary preliminary to a judgment-creditor's suit to reach equitable assets and to commencement of supplementary proceedings.

All means, but the present suit, of collecting the judg-

ment out of the debtor's property were suspended by the sequestration (Act. Sec. 9 [f]).

Such an application of the Act as the court below made results in confiscating the friendly creditor's property instead of the enemy's, which never could have been intended by Congress.

THIS COURT in affirming the dismissal of the complaint in the *Banco Mexicano* case (163 U. S., 591), concludes its Opinion in the following pertinent words:

> "Therefore, the prayer of the bill of complaint should be denied. *We are constrained to this* because we agree with the Court of Appeals *that this suit is, in effect, a suit against the United States*, and all its conditions must obtain."

(The italics are ours.) The intimation is very clear that if the suit had been, in effect, a suit *between private individuals*, in which the United States had no interest, except to turn the property over to such person or persons as the court found to be entitled to it, in short, the interest of a *stakeholder*, that the decision would or might have been different. Otherwise there would seem to have been no occasion for the concluding statement quoted.

And this emphasizes the importance of the testimony offered by the plaintiff to show the fact (if left in doubt), that the sequestered property in the hands of the Custodian and Treasurer was about to be turned over to her, on her application, which had been recommended for allowance, when this suit was commenced; and much of which evidence was excluded by the trial court under plaintiff's exception, which will be noticed under a following point.

Recent decisions of this court, having regard to the Peace treaties concluded and proclaimed August 24th, 1921, and the passing of the Conditions of War, which was the occasion of the Act, and the sequestration of the vast amount of private property still held by the Custodian and

Treasurer of the United States, have adopted a more liberal policy with respect to the Construction of the Act.

> *Miller* v. *Robertson* and *Robert* v. *Miller* (266 U. S., 457);
> *Behnmeyer Co.* v. *Miller* (266 U. S., 243);
> *Swiss Nat. Ins. Co.* v. *Miller* (267 U. S., 73);
> *Matter of Barrett*, 124 N. Y. Misc., 697.

In the latter case, Mr. Justice McReynolds in his very exhaustive dissenting opinion reviews historically the progressive policy of the Government in releasing sequestered property. As disclosed by the Act and its Amendments; the Opinion of Attorney Generals advising Congress in respect to the legislation; the debates on the various measures in Congress; and the decisions of the courts, and their broadening tendency.

In one of the concluding paragraphs of this able Opinion the learned justice says:

> "That a liberal construction should be given to this amendment with a view to carrying out its benevolent purposes, and not a narrow, strained one, which would reflect discredit on the Government."

Although the court's judgment was against the conclusion reached by Justice McReynolds on the facts of this case, it is respectfully submitted that the rule of construction of the amended Act, under present conditions, announced in the paragraph above quoted is eminently sound.

In Miller v. Robertson, Mr. Justice Butler writing for the court said:

> "The purpose of Sec. 9 was to prevent or lessen losses liable to result to intervening persons. This provision is highly remedial and should be liberally construed to effect the purposes of Congress intended to be covered."

It is assumed that the commencement of a suit in the Court of Equity designated by the Act, by a claimant dissatisfied with the actions or inactions of the President upon a claim to properly file, remove the whole controversy into the designated court, equipped with full power to dispose of it as equity may require.

POINT II.

It was made sufficiently to appear from the evidence, that the Republic of France had extended such reciprocal rights to American citizens against sequestered property in that country, in like cases, as the Trading with the Enemy Act, Section 9, as amended June 5, 1920, extends to French citizens. And the contention of the Custodian that no such reciprocal rights had been extended, was against the uncontradicted evidence, and afforded no ground for the dismissal of the complaint, or the affirmance of the judgment.

It may be noted that the Court of Appeals ignored this alleged failure of reciprocity as a ground of affirmance of the decree of dismissal, and placed its decision upon the sole ground that the claim did not arise "with reference" to the sequestered property.

The provision of the Amended Act, Sec. 9 (e) applicable, is as follows:

> "(e) No money or other property shall be returned, nor debt allowed under this section to any person who is a citizen or subject of a nation which was associated with the United States in the prosecution of the War, unless such nation in like cases extends reciprocal rights to citizens of the United States."

It will be observed that what the associated nations are required *to do*, to *extend* reciprocity is not specified by the Amended Act—"unless it *extends*," is the language

used. It does not say, enacts a law by its legislature. That may not be the method by which such nation *extends* privileges to the citizens of other countries. The Century definition of extend is, *to hold out*. Pierre LePaulle, the Government's expert witness, points out the various other ways in which the French Government directs the disposition of sequestered property, by Administrative Decrees, having the force of law, also Circular Letters, Letters of Instruction, etc. (Record, pp. 98, 99, 104, 105).

The best proof of the attitude of the French Republic would seem to be the official acts of its Government communicated to the American Government through some high and recognized official channel.

The French Government speaks to the American Government through the French Ambassador. Pierre LePaulle in his revised deposition, referring to the letter of the French Ambassador to the American Secretary of State of December 11, 1922, offered in evidence and excluded under exceptions (Record, pp. 62-63, thereafter referred to pp. 105-106, 107), says:

> "If officially the statement was made in behalf of the French Government by the Ambassador the only thing for the American Government to do is to believe it. * * * There is no question, but that diplomatic usage accords full credit for the communication which he makes for his Government to the Government to which he is sent. * * * As a question of international law, a statement officially made by an Ambassador is of course the best statement you can have" (Record, pp. 105, 106, 107).

No argument would seem to be necessary on the proposition that the French Ambassador is the accredited representative of his Government in conveying its assurances to the American Government.

The plaintiffs in proof of the extending of reciprocity

by the French Government offered in evidence a certified copy of a communication, received from the French Ambassador by the Department of State under the signature and seal of the Secretary of State, dated the 11th day of December, 1922, with a translation of the same by the Department of State (see Record, pp. 105, 106, 107, Plaintiffs' Exhibit 11 for Identification, Min., p. 102).

This was ruled out by the court upon the information that it then possessed at the time of the power of the French Government to bind itself by such a communication. That since that ruling, the communication was placed before PIERRE LEPAULLE, the expert called by the Custodian, and its legal effect as a matter of French Law and Practice, considered by him on cross and re-cross examination as affecting his direct testimony, and is thus made material. It could not be stricken out of his testimony without affecting his whole direct examination to which it is directly related.

After referring to the case of the plaintiffs pending in this court, and the previous communications exchanged between the French Government and the American Secretary in relation to this claim the communication proceeds as follows:

Communication of the French Government.

"I have the honor to give to your Excellency the assurances that the French Government grants to American nationals reciprocity as it is meant in the Trading with the Enemy Act, Section 9, and that in particular an American national holding a claim against a former enemy whose property was sequestered in France, the validity of the claim having been acknowledged by the judgment of a French court, may seek the execution of that judgment on the property coming under the sequestration up to the assets of the said sequestrated property.

"I should be thankful to your Excellency if you would kindly give notice of this fact to the Attorney General of the United States so that the claims of Mr. Gasquet James and the Countess de la Mettrie may be admitted as early as possible.

Be pleased to accept, Mr. Secretary of State, the assurance of my high consideration (Record, pp. 62-63).

JUSSERAND."

If this does not constitute a formal, authoritative and binding assurance by the French Government, through its highest official source of communication, of the extending of assurance of full reciprocal rights to American citizens as those accorded to French citizens by the Trading with the Enemy Act, it is difficult to imagine what would. Certainly the depositions of French lawyers as to what the French Government would do, or could do, or had done, is not the best evidence, and seems paltry and inconsequential in comparison. PIERRE LEPAULLE was surprised when confronted on his cross examination with this communication which seriously disturbed some of his previous opinions which he endeavored to reconcile with it. He says of this communication, at one place of his cross examination (Record, p. 113).

"If it is considered just as an assurance given to you that the French Government hereby grants now to you reciprocal rights, the French Government is liable toward the American Government for it."

He at first was not inclined to construe it as an assurance. But of course it is not for the witness to construe the communication which is plain and unmistakable in its language. And again he says, when asked if he considers the communication worthless and of no value:

"No, as far as you Americans are concerned this creates the liability of our Government toward your Government and it is certain that the French Government is accustomed to keep its own word. After having made such promise it would take the proper steps to give instructions to the French officials and to the French courts by enacting a law or a decree, and this law or this decree will be binding and put into effect the American rights" (Record, p. 114 [198]).

He further says that a question of law in fact is often settled by circulars and refers to several circulars he had previously quoted, giving the official constructions of the Minister of Justice on such questions of law, and that they have the authority to do so. And again he said:

"Well, if the French Government—if this is taken to be an assurance given to the American Government that reciprocal rights would be granted in the future, it would have taken those steps."

Pierre LePaulle then goes on to say that as a matter of fact the French law is reciprocal—and as he apparently means, irrespective of this communication. He adds:

"What are the rights of the American in France? They are the rights which fall under the three exceptions which I have stated."

When asked finally if he values his own statements as against the official communication of the French Republic and the Cabinet, he becomes somewhat confused apparently, and says:

"I must say that the whole explanation that I have made has shown perfectly well that the rights are reciprocal. They are in accordance with the Trading

with the Enemy Act, which shows that the Frenchman will have the same rights as the American citizen. (He probably means that Americans will have the same rights as Frenchmen.) You give us these rights so these are perfectly reciprocal rights; so it agrees perfectly with what it says here (indicating the law), if instead of saying what the law is, the letter means only that formally and officially the President of the French Republic grants this to the American citizen. I also agree, because such a promise does not grant you any rights that you had not already. I have to acknowledge it is as a treaty, if it is a treaty. Whatever may be the construction you give to this letter, I therefore entirely agree with the statement made by the French Ambassador at Washington" (p. 116).

In the case of *Church* v. *Hubbart* (2 Cranch, 187), which involved the question of the sufficiency of a certificate of a person signing himself "secretary of state of foreign affairs," certifying that a copy of a decree of the Governor of Para, to which it was attached was a true copy, was sufficiently authenticated—and also the question as to whether a consular certificate was admissible to prove the correctness of a translation of the same. In holding that neither authentication was sufficient, Chief Justice MARSHALL, writing for the court, laid down the law upon the subject of proving foreign laws as follows:

"Foreign laws are well understood to be facts which like other facts must be proved to exist before they can be received in a court of justice. The principle that the best testimony shall be required, which the the nature of the thing admits of: or in other words, that no testimony shall be received which presupposes better testimony attainable, by the party who offers it, applies to foreign laws as it does to all other facts.

> The sanction of an oath is required for their establishment, *unless they can be verified by some such high authority that the law respects it not less than the oath of an individual.*"

The plaintiffs-appellants respectfully submit that the formal assurances of extended reciprocity conveyed to the American Government by the French Government, speaking through the communication of the French Ambassador of December 11, 1922, is of greater weight and dignity than the opinion evidence of lawyers as to what it will or can do under such assurance, and is the best evidence.

Pierre LePaulle says that the counsel of state might hold that the President had no power to make such assurances for his Government, just as the courts of the United States may declare an act of the legislature unconstitutional. But the Trading with the Enemy Act has the same weakness; but both will be potent and effective until declared invalid (Record, p. 62).

That the French law without the aid of the assurances conveyed in the communication of the French Ambassador affords full opportunity to American citizens having judgments secured in French courts against Germans to procure their satisfaction in a proper case out of sequestrated property in the hands of the French Custodian, seems to be the final result of Pierre LePaulle's evidence.

A wrong direction was given to the witness's testimony by the first hypothetical question put to him at (Record, pp. 92-93), on his direct examination, which was duly objected to. The question called for the witness's opinion as to whether an American citizen having a judgment of an *American* court against an enemy debtor could make application to the French Government or an official thereof, to have it paid out of sequestered property. The question should have assumed the judgment of a *French* court in favor of an American citizen to make it a parallel to the case at bar, calling for reciprocal

rights of enforcement against sequestrated enemy property, and was therefore irrelevant and misinforming.

This drew from Pierre LePaulle the statement that it would not, because of the general principle of French law —subject, however, to three exceptions—as recognized by Article 297 of the Treaty of Versailles, that a German debtor must be sued in the first instance in his domicile—which simply meant that a judgment recovered in a foreign jurisdiction which did not conform to French national policy would not be enforced by the French Tribunals, the French law not recognizing foreign judgments as conclusive; it being quite different, of course, as to the enforcement of judgments of its own courts. See leading case, *Hilton* v. *Guyot* (159 U. S., 113).

The witness then went on to state what effect the Treaty of Versailles had had upon the disposition of sequestrated enemy property held by the various nations who become parties to the treaty. After the treaty, he says, recourse could not be had to the Custodian, who up to that time had been merely a Custodian or *depository,* but he says:

> "The Germans have recognized by the Treaty of Versailles, this property does not belong any more to the subjects of Germany, and the title was transferred to the different nations in which the property was situated, so this property does not belong any more to him" (Record, p. 86).

This of course is diametrically the opposite of the position of the American Government with respect to sequestered property under the Trading with Enemy Act, as amended June 5, 1920.

He further explains the Clearing House system established by the treaty under Sections 296-297, by which individual relations between debtor and creditor have been eliminated; and the creditor relegated to his application

to the French Clearing House where he presents his claim; the French Clearing House in turn presenting the claim to the German Clearing House, in which there are French representatives; and if allowed the money paid to the French Clearing House, which after a certain amount has been collected, will be applied in certain percentages by it to creditors residing in France. All of which is very interesting and instructive, but has no application to America, which is not a party to the treaty.

Much of the testimony of Pierre LePaulle is based upon the theory that American nationals are bound by the treaty, which our Government repudiated and refused to become party to.

What then was the French law applicable to subject, before the Treaty, and which is still applicable to American citizens making claims in France upon French judgments recovered by them in 1915 upon claims arising before the war?

(1) Pierre LePaulle distinctly states that the remedy given by the (French Civil Code, Article 1961), was not affected by any decrees, circulars or laws made during the war prior to the law of October 7, 1919, which supplemented the Treaty of January 10, 1919. He says:

> "In any case where they could attach the property according to French laws, the French Government could not stop this creditor from attaching such property. *This point has been in controversy a long time, but it was finally admitted they could do so*" (Rec., p. 101).

He also testifies that the laws of France do provide for the collection of judgments out of the property of the judgment-debtor (Record, p. 101).

There seems to have been abundant French law to protect American judgment-creditors in France in their collec-

tion out of the sequestered property of these judgment-debtors irrespective of all laws and executive decrees and circulars prior to October 7, 1919, and is now, unless affected by the Treaty of Versailles and the Law of October 7, last referred.

(2) But considering all these prior decrees and regulations, the witness says that the fundamental prior sequestration law of October 23, 1913, provides among other things for the payment by this Custodian out of *"Passive"* and refers to circular letter of November 3, 1919.

He defines Passive as follows:

> "Passive means there are some people who can get some money out of the Alien Property Custodian."

And he says that "this word 'Passive' is so vague that it has given very large powers to administration officials."

The Three Exceptions:

He goes on to state that there are three exceptions to the general rule, which prevents creditors from proceeding directly against property of enemy debtors in the hands of the French Custodian:

1st Exception: The case where the sequestrated property constitutes all of the German debtor's property, who before the war had his principal establishment in France (Record, pp. 86-87).

2nd Exception: Where the sequestered property was reasonably subject to some pledge as special charge (Record, pp. 87-93).

3rd Exception: Where an *Equitable* basis appears for allowing the claim, such as the creditor's reliance upon the property of the debtor, *and the debt arose before 1914* (Record, p. 89).

The *rule as to date*, as to when the debt arose, he states, is liberally construed by the Custodian in practice and that: *"Under equitable rules we always refer to the date of the original debt*, because it would be too simple to change the date of the debt" (Record, pp. 88, 93, 94, 104, 105).

This the plaintiffs attempted to prove by offering the account filed by the defendant James on April 17, 1913, in which she admits an indebtedness of $21,642.39, subsequently adjudged by the Surrogate's Court to be $236,333 but the court excluded the evidence (Record, pp. 79-80; Assignment of Errors [5], p. 151).

And further he says: "This 3rd Exception has been worked out on an equity basis by the administrative practice of the French Custodian. *It is in the nature of an equitable lien* in working out the French idea of liquidation" (Record, p. 93).

So if the original debt is prior to August 2, 1914, as a question of fairness of equity, the practice of the French Alien Property Custodian is to consider it as the original date of the debt (Record, pp. 80, 88 to 105).

The judgment of the plaintiff was for claims running back seven years before the executrix filed her account in 1913, upon which the large deficiency judgment was rendered by the Surrogate's Court in 1915, and included items running back over the whole period of her executorship.

Such a claim in France would clearly fall within the 3rd Exception referred to by Pierre Le Paulle.

(4) Lifted Sequestration.

The witness refers to another practice which prevails under the French law, both formerly and now. He says:

> "Sometimes, according to some liberal rules, the French Government recognizes that property *technically German* is *substantially French*, and it will turn

> the property over to the French proprietors of that property or take some other proceedings. A foreigner can later recover the amount of his claim out of that property if the sequestration has been lifted or given back to those from whom it has been taken; so that sometimes foreign creditors can recover quite well out of property which has been sequestrated, if later the sequestration has been lifted, and that sometimes does happen."

This would seem to apply directly to the case at bar in view of the lifting of the sequestration upon Madame James' property in the hands of the Custodian and Treasurer under the amendment of June 5, 1920, or otherwise.

No rulings were made by the court upon the objection to portions of Le Paulle's evidence. On the whole his evidence went to show that American citizens securing judgments of French courts did have abundant remedies in France to satisfy them out of sequestered property under conditions similar to the present case; and this is fully confirmed by the deposition of plaintiff's expert.

RENE PELLERIN, a French lawyer (Record, pp. 130-135), whose delayed deposition occasioned so much trouble, makes it clear in his opinion that American claimants, when debts or claims have been duly established, are fully protected by the French law in enforcing them against sequestrated property of their judgment-debtor. He testified (Answer to 11 Interrogative, Record, p. 131):

> "Up to the present, civil law has always been applied to French, allied or neutral creditors unless reciprocity was not guaranteed" (See Answer to 14 Interrogatory, to same effect).

And again in (Answer, p. 13):

> "In no case has a refusal been made on a question of principle, to effect payment to an American

citizen of a claim against an enemy subject whose property has been sequestrated in France."

And again in Answer to Interrogatory 20, Record, page 134:

"There can not be found a single case of refusal on the part of the 'Office des Biens et Interet Prives' of France to effect payment of an American citizen out of proceeds of sequestrated property of a duly established claim."

And in Answer to Interrogatory 17 (Answer 17), he says:

"There are no restrictions in the Treaty of Versailles."

The answer to this 21 Interrogatory shows that all the decrees, circulars, etc., provide for the settlement by the liquidators of the sequestered property in the widest possible spirit, after full proof has been made of the rights of each creditor whether of French, Allied or neutral.

It is to be especially noted that the extending of reciprocal rights refers to the right to *present* claims. There is nothing in the Trading with the Enemy Act which grants anything to a foreign creditor but the right to *present* his claim to the duly constituted Tribunal to have it paid out of the sequestrated property of the debtor, in the discretion of the court sitting as a court of equity.

When the French Government has extended or accorded a similar right to American citizens it has met all the requirements of reciprocity. A decision by this court in this case (which is doubtless being watched with interest by the French Government which has drawn the especial attention of the American Government to it), that France, in spite of its communication of December 11, 1922, has *not* extended reciprocal rights to Americans under the Trading with the Enemy Act, and has denied reciprocity

to France after she has extended such full reciprocity to America, is to be considered in its effect not only upon the plaintiffs, but also upon American claimants in France to sequestrated property in the hands of that Government as well as the effect of such a decision upon Franco-American relations.

POINT III.

(Assignment of Error 16-Rec., p. 5 (M.) 151.

The court erred in excluding plaintiffs' exhibit 14 for identification, being the account of the defendant James filed in the Surrogate's Court of Ulster County on April 13, 1913, which is the basis of the judgment upon which the plaintiffs' claim in the present suit is founded (Plaintiffs' Exhibit. ., see Rec., pp. 79-80).

The evidence was material upon the question of French reciprocity. At the time it was offered the Custodian expert witness Pierre La Paulle, had testified by deposition that one of the cases in which France accorded rights to claimants of sequestered property was when the debt arose prior to 1914, and that the French rule looked to the date when the claim arose rather than, when judgment was entered upon it. He said:

> "So if the original debt is prior to August 2, 1914, as a question of fairness and equity, the practice of the French Alien Property Custodian is to consider the original date of the debt" (Record, pp. 88, 89, 93, 94, 104, 105).

The account filed by Madam James as executrix admitted an indebtedness of $21,642.39, on April 17, 1913, which the court found to be $236,133.

This clearly brought the case within the 3rd Exception

testified to by the witness to his general opinion as to the limits of French reciprocity, and gave the right to creditors to recover their debts out of sequestered property in the hands of the French Custodian. The only ground for excluding it seems to have been the statement of the learned court that it might never read the depositions, and until it was read it was immaterial. The ruling and exception were referred to incidentally in a preceding point (Plaintiffs' Exhibit 14, for Identification, Record, p. 8).

POINT IV.

The plaintiff sought to show at the trial that an attempt was being made by the absentee judgment-debtor James to remove her property (which Congress had declared its purpose to release from the reach of the plaintiffs, her judgment-creditors; and that she was being furthered in this attempt by the action of the Alien Property Custodian, who had allowed her claim to the restitution of the property and was prepared to turn it over to her secretly, out of the State of New York, if the present suit was dismissed. That the evidence offered in support of this allegation, was material and competent and its rejection by the trial court on the objection of the Assistant Attorney General was reversible error (Assignments of Error 5 [e], a', b', c', Record, p. 150 Errors 5 [b], Record, p. 150).

It is conceded that the defendant James had filed her claim for restitution of the sequestered property with the Custodian on December 24, 1920. After an examination by plaintiff's counsel of some of the papers relative to the application and its allowance in the Attorney General's office, the Special Assistant Attorney General in charge of the case, agreed to produce all the papers in

the matter in court, with the same effect as if subpoenaed by a subpoena *duces tecum*—and did so produce them, when an attempt to put certain of them in evidence by the plaintiff's counsel was steadily opposed by the Attorney General, who was sustained throughout by the court on various objections and grounds.

It was of course important to show that the funds in the hands of the Government were funds that the United States had by the Amendment of June 5, 1920, Sec. 9 (b), declared its purpose to relinquish all claims to, as enemy property, and made available, and was about to turn over, to the defendant, James. The Application of Madam James filed December 24, 1920, with the Custodian; the proofs filed in support of her claim to restitution, and the recorded action of the Government upon the Application, were most material on the question of the *status* of the property, whether of the class to which the Government had released its claim, and thus ceased to be a real party in interest, or the class of sequestered enemy property, as to the disposition of which Congress has not yet declared its purpose.

The evidence was not only material on the question of jurisdiction as argued in the preceding point, but was material in showing the attempt of the defendant judgment-debtor to remove her property from the reach of her judgment-creditors through the instrumentality of the Alien Property Custodian and Treasurer, and to obtain a decree of a Court of Equity to accomplish such fraudulent and criminal purpose. This evidence was of the very gist of the suit. The rulings excluding the evidence were varied and difficult to follow.

All the papers referring to the claim of Madam James were at first stated by the Government's counsel to be in court, accompanied by his refusal to produce them unless ordered to do so by the court (Record, p. 64).

There followed a long attempt to get the papers in evidence. The court required plaintiffs' counsel to specify

the particular papers wanted, and counsel began by calling for the defendant's claim application for restitution filed December 24, 1920; then the affidavits and other proofs filed in reference to the claim; and the report filed recommending the allowance of the claim, and various other papers, which he *offered in evidence.*

(See Asst. Error No. 5 [e], a′, b′, c′.) All of which the Government's counsel refused to produce, and finally refused to say whether the papers called for were in court or not, and was sustained by the court. Plaintiffs' counsel then *offered in evidence* all the papers pertaining to the claim which the counsel had in a bundle in court; the court excluded them, upon the ground that it did not appear that the papers specifically called for were in court.

Plaintiffs' counsel then called the Assistant Deputy Attorney General to the witness stand to prove by him what papers he had brought to court under the stipulation, but the learned court refused to have him sworn.

The court finally excluded all the evidence thus offered on the ground of *privilege* (Record, pp. 67-68).

It was not claimed that any Government secret was involved. The Custodian was acting in a judicial capacity upon a claim filed in his office by the defendant. That such a claim was filed on December 24, 1920, was not denied. Why then was the plaintiff not entitled to prove it by putting it in evidence, and every other document relating to the disposition made of it, the same as a court record? The proceedings of the Custodian are not Star Chamber proceedings, and are not privileged (Record, pp. 65-71).

To hold that the vast properties captured during the war were to be disposed *in camera* by Government officials out of court, would constitute a serious departure from American governmental policy as State secrets; they should be available as evidence in the courts of justice when material. We can understand why Madam James should not wish to have her judgment-creditors know what

disposition was being made of the sequestered property until it should be turned over to her, and wish to have it regarded as a "State secret"; but why the Custodian or the Attorney General should wish to so regard it is not so clear.

The ruling excluded all evidence in the possession of the Custodian or Attorney General's possession of claims filed under the Trading with the Enemy Act, or their disposition, without regard to their relevancy and without examination—upon the sweeping ground of *Privilege*. Appellants submit that this is an extension of the rule of privilege seriously prejudicial to the administration of justice and without precedent, and constitutes reversible error (Record [e], pp. 65 to 68, Error, p. 150).

Assignment of Error (Record, 5 [f], pp. 150-151).

The court erred in refusing to allow the Assistant Deputy Attorney General to be sworn and examined in regard to the papers which he had brought to court, which was duly excepted to (Record, pp. 66-67).

Assignment of Error 5 (g) (h) (i) (j) (k).

The court erred in excluding the evidence of the New York Sections 1171 and 1172 of the New York Criminal Code making it a crime for a debtor to remove his property to avoid its being made liable for the payment of his debts or levied upon by execution, etc., and for any one to assist him in so doing; and other provisions of the statutory law of New York with relation to fraudulent transfers and other remedies provided by the Code of Civil Procedure, which were all ruled out as immaterial and irrelevant (Record, pp. 75, 67, 78).

Upon the merits of the case, which is in effect a judgment-creditor's bill under the Trading with the Enemy Act, to prevent a fraudulent transfer of a judgment-

debtor's property it was certainly material to show what the law of another State was, which the absentee defendant-debtor was trying to evade by having the property delivered to her out of the State of New York, and in Europe.

Assignment of Error 17.

For the purpose of showing that the Alien Property Custodian held the sequestered property of Madam James to be returned to her on January 3, 1921, plaintiffs put in evidence a document in the James' Claim (5309) from the Custodian's files which was received and marked Plaintiffs' Exhibit 12 (Record, p. 136—printed pp. 141-142). Subsequently counsel for the Government attempted to add to this document by oral statements not under oath, which plaintiffs' counsel objected to unless the counsel went on the stand and submitted to cross examination, which the learned trial court refused to allow, and excluded the document which had been previously admitted in evidence (Record, pp. 136-140). Exception to the ruling duly appears.

The exhibit so stricken out after its admission in evidence was of great importance as it tended to show that the Custodian had allowed Madam James' claim, as it distinctly refers to "*property to be returned,*" which had been taken over in her name. Its admission broke through the wall of exclusion which the court's rulings had built around the records of the Custodian relating to Madam James' claim to restitution and its allowance, which the Government's counsel hastened to close up, as soon as he discovered what the effect of the document was. The record will be found not to justify any of the grounds upon which with heated declamation the counsel persuaded the court to exclude the document previously admitted. The evidence of this document bore directly upon the basic question, as to whether the contest was in effect between

Madam James and the plaintiffs as the real parties in interest, or between the plaintiffs and the Government of the United States as the real parties in interest, or the Government as a stakeholder; and whether the defendant was making use of the trading with the Enemy Act and the Custodian to remove her New York property from the reach of her creditors.

It is submitted that ruling of the court in the matter constitutes reversible error.

THE RECEIVER'S APPEAL.

(347)

POINT V.

The application of the Receiver of the New York Supreme Court to the Court of the District for leave to intervene in the action, as the successor in interest of the defendant, judgment-debtor James, to the property in the hands of the Custodian, and Treasurer, was improperly denied, and the Court of Appeals erred in affirming the decree of the District Court upon the ground that the Receiver was stayed from such intervention by sub-section (f) of Section 9 of the Act.

The defendant James had filed application with the Custodian for the return of the property to her under the provisions of the Amended Act, on December 24th, 1920 (Stipulation 12, Record, p. 72).

It was alleged in the Receiver's Petition that the claim had been allowed by the President in May, 1921, and the property was about to be turned over to the defendant when the present suit was commenced staying such payment and surrender (Petition, p. 39, fol. 68).

No reason was assigned by the court of the district for denying the application.

The reason for affirming the decree of denial given by the Court of Appeals, is stated in its opinion as follows:

> "This ruling was correct, since the property now in question was already held by the Custodian under the Trading with the Enemy Act, and sub-section (f) of Section 9 of the Act provides that property so held shall not be liable to lien, attachment, garnishment, trustee process, or execution, or subject to any order or decree of any court" (Record, p. 147).

The sub-section in full is as follows:

> Section 9 (f) "Except as herein provided, the money or other property conveyed, transferred, assigned, delivered or paid to the Alien Property Custodian, shall not be liable to lien, attachment, garnishment, trustee process, or execution, or subject to any order or decree of any court."

It is submitted the construction given to this sub-section by the learned court below was entirely erroneous.

The object of the provision it seems clear, was to relegate claimants to sequestered property to the Tribunals provided by the Act: first the President, on application; and second to the Court of Equity designated in the instant case, the Supreme Court of the District of Columbia. Claimants were not left remediless, but the doors of the Court of Equity were left open to them, and the property was rendered *immune* from attack in other courts, while it remained in the hands of the Custodian.

The learned court failed to give effect to the qualifying words occuring in the first line of sub-section (f) "Except as herein provided."

Section 9 provides a Court of Equity with plenary powers for determining the rights of the claimants, over the President's disposition of the same; and that is the court to which the Receiver made application.

That seems to be all there is to the question.

The Receiver's standing to make the application arose from the following facts.

On the 18th day of June, 1923, David Keane of the City of New York was appointed by the New York Supreme Court Receiver of "all the property, debts, equitable interests, right and things in action, effects and estate" in a proceeding supplementary to execution begun by George Pratt de Gasquet James, in said court (Record, pp. 43-44), and was likewise appointed such Receiver in a similar proceeding brought by Pauline Andreé de la Mettrie in Oneida County, N. Y., by the County Judge of said County on July 28, 1923 (Record, pp. 45-47).

On the 13th day of July, 1923, an order was made by the Special Term of the New York Supreme Court ordering and directing the Receiver, among other things, "to intervene in an action now pending in said Supreme Court of the District of Columbia brought by Pauline Andreé de la Mettrie and George de Gasquet James against Elizabeth Pratt de Gasquet James and others to recover the property of the said Elizabeth Pratt de Gasquet James sequestered by the Alien Property Custodian during the war"; which was the above entitled action (Record, pp. 49-50).

On September 21, 1923, the Receiver filed and served his petition and notice of motion in the Supreme Court of the District of Columbia, praying to be made a party plaintiff or defendant in the said pending cause for the purpose of asserting his rights as Receiver to the sequestered property of the defendant James and for other relief (Record, p. 35).

The said motion was brought on for hearing before Mr. Justice Hoehling and referred by him to Chief Justice McCoy, the justice trying the said cause.

At the resumption of the trial on October 2, 1923, the motion of the Receiver was heard by the learned trial judge and denied, in the following language:

"I shall deny the motion for leave to intervene and you may take take an exception" (Record, p. 64).

A formal order denying the motion was thereafter made and entered on December 17, 1923. The order appealed from (Record, pp. 54-55).

Immediately upon the denial of the Receiver's motion for leave to intervene and at the conclusion of the argument thereon on October 2, 1923, the plaintiffs moved upon the said papers filed, and on their own behalf to amend the amended bill for the purpose of bringing in the Receiver, who had acquired an interest in the sequestered property of Madam James, that such interest might be determined.

This motion was also promptly denied by the court, upon the ground that it did not differ from the Receiver's motion previously denied (Record, p. 64).

The trial was concluded on December 1, 1923 (Record, p. 135).

It appeared then by the Receiver's petition (1) that he had been appointed by the New York Supreme Court, and the County Court of Oneida County as well, and qualified as Receiver in supplementary proceedings of *"all the property, debts, equitable interests, rights and things in action effects and estate, real and personal"* (Record, pp. 39-40): (2) that by the filing of the order the Receiver under the New York law Civil Practice Act 809 became vested with the title to all the property of the judgment-debtor (Record, p. 40); (3) that under the law of the State of New York the Receiver in supplementary proceedings represents not only the judgment-creditors for the purpose of paying their judgments out of the property of the judgment-debtor collected by him, but also the judgment-debtor, for conserving her estate and paying the balance of the same, if any, after payment of the judgment-creditors to the debtor (Record, pp. 41-42): (4) *that upon information and belief, the application of the defendant*

James filed with the Custodian on December 24, 1920, for restitution of her sequestered property in the hands of the Custodian under the Amendment of the Trading with the Enemy Act of June 5, 1920, had been allowed, and the property was about to be turned over to the defendant James when this action was commenced and its payment stayed (Record, p. 39): (5) that the judgment-debtor being absent from America, notice of the application for the order was duly served on her agent and attorney in fact, George M. Weaver (Record, p. 44): (6) that the Supreme Court of New York authorized and directed its said Receiver to make application to the Supreme Court of the District of Columbia to intervene in this action (Record, pp. 49-50, Exhibit C).

Other allegations of the petition, and reply affidavit of J. Noble Hayes shows that the Receiver had acted with due diligence in making the application, in the suspended situation of the case, which was awaiting the return of a commission sent out to France to take testimony (Record, p. 42, Affd. Hayes, pp. 51-54).

No denial of the allegations of the petition has been made, except such as may be inferred from the short reply affidavit of the Special Assistant Attorney General, Dean Stanley, in which he alleges that he has been unable to find any records, which show that the claim of Madam James has been acted upon by anybody *having authority to act* (Record, pp. 50-51) which was not competent evidence.

This affidavit was made on October 2, 1923, the same day on which the papers referring to the claim in a large bundle were brought into court by Assistant Attorney General Stanley under a stipulation which was a substitute for a *subpoena duces tecum*, and which he successfully resisted every effort of plaintiffs' counsel to put in evidence to prove the facts in relation to the claim and its allowance, as opposed to the *conclusion* of his affidavit.

If the Receiver had been permitted to intervene in the suit, can there be any doubt of the power of the court

sitting as a Court of Equity, with the subject matter of the suit, and all the parties in interest before it, to make such disposition of the same as equity required? Including of course the turning over of the property to the Receiver of the New York Court, who stood, in the shoes of the defendant James in respect to her property and claim for which she had filed application in 1921, which, it was alleged, had been allowed and was about to be turned over to her when this suit was commenced. She being a party to the suit would have full opportunity to be heard on the merits; and the plaintiffs would not in all probability oppose such a disposition of the property as would restore it to the jurisdiction of the New York Courts. The Custodian whose proper position would seem to be that of neutrality as between the adverse claimants, would be fully protected by any decree the court might make.

This court said in *Miller* v. *Robertson* (266 U. S., 457):

> "We think sub-section 9 gives now, as the same words gave from the first, the right of recovery to any person never an enemy, or ally of an enemy within the statutory definitions, *Stokes* v. *Wallace*" (supra).

Full power is conferred by the Amended Act, Sec. 9 (b [illegible]) or c) to direct the turning over of the sequestered property without application therefor in the case of an American woman who has married a German citizen, when the sequestered property came from her (Sub-sec. b-3). In such an event, and—

> "Then the President, without any application being made therefor, may order payment, conveyance, transfer, assignment or delivery of such money or other property held by the Alien Property Custodian or by the Treasurer of the United States, or of the interest

therein to which the President shall determine such person entitled, either to the said owner or to the person by whom said property was conveyed, transferred, assigned, delivered or paid over to the Alien Property Custodian."

And see Sub Sec. (c).

That the court is vested with all the powers of a Court of Equity to dispose of the fund to accomplish the ends of justice and equity.

Fowler v. *Custodian* (*supra*);
Stochr v. *Wallace* (255 U. S., 245);
Miller v. *Robertson* (266 U. S., 457;
Behn Meyer Co. v. *Miller* (266 U. S., 243);
Swiss Nat. Ins. Co. v. *Miller* (267 U. S., 72).

Such a power includes that of bringing in necessary parties.

Judge Hand in the *Fowler* case referring to the provisions of the Act requiring that after the commencement of a suit by a claimant the sequestered property shall be retained by the Custodian until final decree, says that he can discover no reason for it "*unless the provision means that after suit is brought exclusive right to determine the ultimate disposition of the property shall be in the court.*"

The Court of Chancery, "that great receptacle of all undefined powers and remedies," is seldom at loss in necessity for a remedy to prevent a total failure of justice when an extraordinary case like that at bar is presented.

The Act refers these controversies to the Courts of Equity designated. It is unthinkable that it should have been the intention of Congress to invoke the powers of a court which it first proceeded to render impotent.

A Court of Equity cannot act, as such, without allowing the full play of all its inherent and constitutional powers. Once its jurisdiction attaches, the principles which govern such courts spring into full life and vigor

and control the cause and direct the relief to be administered. Otherwise it would not be the Court of the Chancellor. *Spiegelberg* v. *Garvan* (260 Fed. R., 302). As was recently said by the New York Court of Appeals in *Bergoritz* v. *Houlberg* (decided March 21, 1921, 230 N. Y., 261):

> "Jurisdiction exists that right may be maintained. Rights are *not* maintained that jurisdiction may exist. The People in establishing the Supreme Court to administer the law did not petrify the law which the court is to administer. *Matter of Stillman*, 139 N. Y., 337; *Clapp* v. *McCabe*, 84 Hun, 379, 135 N. Y., 525, Court Art I, Sec. 16."

Ober v. *Gallagher*, 93 U. S., 199;
Ward v. *Todd*, 103 U. S., 329;
Byers v. *McAuley*, 149 U. S., 623;
Gormley v. *Clark*, 134 U. S., 338;
16 Cyc., 181 and 106 Note C. and cases there cited:
11 Cyc., 847, Note and cases there cited;
Baily v. *Hornthal*, 154 N. Y., 648.

It is equally evident that if this suit were dismissed the property might be turned over to Madam James under her pending application or without any application, anywhere outside of the State of New York and elude thus her judgment-creditors completely, and reach her in Europe, where she could dispose of it with impunity; and that is what the present suit seeks to prevent (Sec. 9b [3] and C).

Two other questions of law presented by the Receiver's motion, and by the present appeal are:

(1) What effect upon the title to the property of a judgment-debtor has the appointment of a Receiver of his property by a New York Court, in proceedings supple-

mentary to execution, under the laws of that State, and generally in the United States, with respect to divesting the title of the judgment-debtor and transferring it to such Receiver?

(2) How far, under American law, will a Receiver of the property of a judgment-debtor, appointed by the courts of one State, be recognized, and his title upheld and enforced, as to property of such debtor located within such other or foreign State?

(1)

The Law of the State of New York, and generally of all the American States, is that the appointment of a Receiver divests the person of whose property, both real and personal, he is appointed such receiver, and vests it in the Receiver.

The Civil Practice Act of the State of New York provides as follows:

> "Section 809. *Vesting of Property in Receiver.*
> The property of the judgment-debtor is vested in a receiver who has duly qualified, from the time of the filing of the Order appointing him or extending his receivership, as the case may be, subject to the following exceptions:
> 1. Real property is vested in the receiver only from the time when the order or a certified copy thereof, as the case may be, is filed with the Clerk of the court where it is situated.
> 2. When the judgment-debtor, where the order is filed resides in another County of the State, his personal property is vested in the receiver only from the time when a copy of the order, certified by the Clerk in whose office it is recorded, is filed with the Clerk of the County where he resides."

The American-English Encyclopedia of Law, Vol. 23, page 1088, states the law of the acquisition of title by a receiver as follows:

> "Under various State Statutes relating to the appointment of receivers of corporations, or the appointment of Receivers in supplementary proceedings, it has been held that the Receiver takes title to both real and personal property merely by virtue of the order of his appointment."

and cases cited in all the States and cases in the Federal Courts. See also:

> *Reynolds* v. *Etna Insurance Co.*, 169 N. Y., 635; *Mulsten* v. *City of N. Y.*, 213 N. Y., 308; *Matter of Holton* v. *Robinson*, 39 App. Div. (N. Y.), 46; *Matter of S. S. T. & B. Co.*, 136 N. Y., 173, and cases there cited.
>
> *People* v. *Cocks*, 162 App. Div. (N. Y.), 453; *Steinert* v. *Van Aiken*, 165 App. Div. (N. Y.), 206; *Matter of Lennox*, 57 App. Div. (N. Y.), 515, affirmed on appeal in 167 N. Y., 623.

Counsel for Madam James, argued in his brief submitted to the Court of Appeals, that Receivers in supplementary proceedings under the New York laws did not possess the powers of Equity-Receivers, to bring suits and apply for recognition in foreign States—*The law is just the contrary.* The case upon which he relies, Boucker C. Co. v Callahan Co. (218 N. Y., 321) merely holds that the Code provisions extending the right of examination of judgment-debtors, to domestic corporation, does not permit the appointment of a Receiver of such corporation in supplementary proceedings, which would permit preferences to the vigilant, which the *corporation* law of the State does not in the distribution of its assets. Gen. Corp. Law (S. [f], O, 6, 112, 134).

The case is not in point at all.

The leading case of *Porter* v. *Williams* (9 N. Y. Court of Appeals, 142), holds that a Receiver in *supplementary proceedings* under the New York Statutes is vested with the title to real and personal property by force of his appointment, without any assignment, and as he represents the creditor as well as the debtor he may maintain an action to set aside a prior fraudulent conveyance. The opinion states that this was the law before the Code, citing *Mann* v. *Pentz*, 2 Standf., Ch. 157.

In the Matter of S. S. T. & B. Co. (136 N. Y., at page 173) the Court of Appeals of New York said:

> "The question of the effect of the appointment of a receiver upon the title to the property of the person or corporation for which he is appointed is not a new one. In *Mann* v. *Pentz*, 2 Sand., Ch. 257, it was said when the appointment of a receiver was completed, the title to all property and effects which were subject to the order vested in him. To the same effect are *Porter* v. *Williams*, 9 N. Y., 142-148, and *Van Alston* v. *Cooke*, 25 N. Y., 489-496 * * * Matter of Christian J. Co., 128 N. Y., 550."

Under the New York Statute as interpreted by its courts, it is the duty of the Receiver to collect and apply the assets of the judgment-debtor under the supervision of the court and apply them to the payment of the judgments of the judgment-creditors, at whose instance and in whose supplementary proceedings he was appointed in order of their diligence.

> *Boucker Contracting Co.* v. *Callahan Co.*, 218 N. Y., 321;
> *Ward* v. *Baker*, 186 App. Div. (N. Y.), 652.

The foregoing authorities seem to establish, beyond question, the rule in New York and the States of the Union generally, of the vesting of the title to property in a Receiver, whether a mere Equity Receiver or a Statutory Receiver.

(II)

The extra territorial effect of an Order appointing a Receiver is not absolute, but depends upon comity, which is uniformly extended, in recognition and support of the Receiver's title, where it does not conflict with the public policy of the foreign state, nor prejudice the rights of its citizens.

The above is the rule prevailing in the courts of the States of the Union generally if not universally.

The question has been much discussed in the American Courts, and considerable difference of opinion existed on it in the earlier decisions and since the case of *Booth* v. *Clark*, 17 How (How. [U. S.]), 322, which held that there was no *right* of recognition of a Receiver appointed by the Courts of one State by the courts of another State under Article IV, Sec. I of the United States Constitution, which provides that:

> "Full faith and credit shall be given in each state to the Public Acts, Records and in judicial Proceedings of every other state," etc.

The case has been since distinguished as not to apply to the recognition of foreign receivers upon the principle of comity, and such is the common practice between the states.

The following authorities clearly support this view of the law of inter-state reciprocity.

The rule is stated in 23 American & Eng. Enc. Law, page 1108, as follows:

> "While receivers have not of right, any extra territorial jurisdiction, receivers appointed by the courts of one state, as a rule, recognized and protected, and their rights enforced as a matter of comity

by the courts of another, when this can be done without conflict with the public policy of the latter state, and without prejudice to the rights and interests of its citizens."

In *Bernheimer* v. *Converse*, 206 U. S., 516, at page 534, the court, Justice Day writing says:

"It is objected that the receiver cannot bring this action, and that *Booth* v. *Clark*, 17 How, 322; *Hale* v. *Allison*, 188 U. S., 56, and *Great Western M. Co.* v. *Haines*, 198 U. S., 581, are cited and relied upon. But in each and all of these cases it was held that a chancery Receiver having no other authority than that which would arise from his appointment as such can not maintain an action in another jurisdiction. In this case the statute confers the right upon the Receiver, as a *quasi assignee* and representative of the creditors, and as such vested with authority to maintain the action. In such cases we think the Receiver may sue in a foreign jurisdiction."

Relfe v. *Rundel*, 103 U. S., 222;
Howarth v. *Angle*, 162 N. Y., 179.

See also:

Burget v. *Robinson*, 123 Fed. Rep. (U. S.), 262;
Finney v. *Guy*, 189 U. S., 335.

In *Howarth* v. *Angle*, 162 N. Y., page 186 (cited with approval in *Bernheimer* v. *Converse*, 206 U. S., 516), the court, by Judge Vann, said:

"While foreign Receivers cannot sue in this state, as matter of right 'still our courts uphold the title of a foreign assignee or Receiver upon the principle of comity. If the title is by virtue of a voluntary conveyance or transfer, it is sustained as against all,

including even domestic creditors, but if it depends upon a foreign statute or judgment it is sustained as against all except domestic creditors. Every remedy is afforded to gather in the assets unless it would interfere with the policy of the state or impair the rights of its own citizens' *Maborn* v. *El. Co.*, 156 N. Y., 196."

Gaines v. *Clark* (51 App. D. C., 71).

In *Barley* v. *Gittings*, 15 D. C., 438, the court after discussing *Booth* v. *Clark* (17 How., 327), said:

"There seems to be no controlling reason why the courts of this jurisdiction, exercising a sound discretion in the application of the rules of inter-state comity, should not upon application permit interventions and suits by such Receivers appointed by state courts when important interests of creditors and others would be subserved, and when to do so, would not contravene the policy of local laws or be detrimental to the interests of domestic creditors."

"Whatever may have been the doctrine of earlier days the decided tendency of later decisions is towards maintenance of the views above expressed. *Burnell* v. *Supreme Setting of Iron Hill*, 161 Mass., 224; *Belden* v. *Hosner*, 101 Mich., 432; *Dumond* v. *Jewett*, 46 La. A., 559; *Gilman* v. *H. R. R. & C. Co.*, 84 Wisc., 60; *Patterson* v. *Lyde*, 112 Ill., 196; *Bank* v. *Lord*, 38 Ohio St., 174; *Castleman* v. *Templeman*, 87 Maryland, 553; *Day* v. *Postal Tel. Co.*, 66 Md., 554; 20 Am. & Eng. Encyc., 242-244, and cases cited. We think therefore that the Virginia Receiver was entitled to intervene in the proceedings below, and it was error to dismiss the petition."

In *Hoyt* v. *Thompson*, 5 N. Y., 320, 340, the N. Y. Court of Appeals, speaking through Ruggles, J., said:

"It is a conceded principle that the laws of a state have no force *proprior vigori* beyond its territorial limits. But the laws of one state are frequently permitted by the courtesy of another to operate in the latter for the promotion of justice. where neither that state nor its citizens will suffer any inconvenience from the application of the foreign law. This courtesy or comity is established from motives of respect for the laws and institutions of foreign countries, and from consideration of mutual utility and advantage."

The foregoing authorities sufficiently state the American law as to inter-state recognition of foreign Receivers, placing the same—where the receivership is not construed as a quasi assignment and therefore treated as absolute—upon the ground of *comity.*

The rule of *international comity* remains to be considered. There would seem to be no good reason why it should differ from comity between the states. However there may be one rule of evidence in the state courts and another in the Federal courts, the one to be applied in a given case, depending upon the system of courts in which the suit or proceeding is brought.

In the leading case of *Hilton* v. *Guyot,* 159 U. S., 113, it was stated: that the rule of reciprocity in giving effect to foreign judgments is a part of international jurisprudence in accordance with which a judgment rendered in a foreign country is allowed the same effect only as the courts of that country allow to the judgments of the country in which the judgment in question is sought to be executed. A judgment rendered in France against a citizen of this country is only *prima facie* evidence of the justice of the plaintiff's claim, in the absence of any statute or treaty on the subject, since by the laws of France, judgments of other countries are reviewable upon the merits.

The rule respecting the appointment of Ancillary Re-

ceivers, when they are necessary, is stated in 23 American & English Encyc. of Law as follows:

> "When a Receiver has been appointed by the courts of one state, the courts of another state may when necessary or proper appoint an Ancillary Receiver. It is as a rule within the discretion of the court of the latter jurisdiction whether to appoint an Ancillary or an independent Receiver of the assets found within the domestic jurisdiction, as it is also discretionary whether if an ancillary Receiver is appointed the court will appoint the person already appointed and acting in the foreign state or some other person selected by the court."

If the Ancillary Receiver appointed is the Receiver of the foreign state, he is, of course, under the control of the court appointing him as such Ancillary Receiver.

It would seem that no stronger case could be presented upon the merits calling for the recognition of the Receiver, and his ancillary appointment. The Supreme Court of the State of New York has sent its Receiver into the Supreme Court of the District of Columbia and asked that court to assist it in preventing the laws of the state and the decree of one of its courts from being circumvented by a judgment-debtor, to whose rights in the property which is the subject of a suit pending therein the Receiver has succeeded, and to prevent its being removed by the debtor from the reach of her judgment-creditors, and in violation of the Penal Law of the state. In such a case it was error, under this great weight of authority to deny the Receiver's Petition to Intervene.

Barley v. *Gittings,* 15 App. D. C., 427, 438;
Credit Co. v. *U. S.,* 177 U. S., 311-315;
Gaines v. *Clark,* 51 App. D. C., 71;
U. S. Trust Co. v. *Chicago Terminal I. R. Co.,* 188 Fed., 292; 110 C. C. A., 270;

Miller v. *Equity Pr.*, Sec. 77, Intervention;
Foster's Fed. Pr., Secs. 261-262;
Davids Ch. P., 287, Note Pomeroy's Remedies, Secs. 411-431;
Beach Eq. Pr., Sec. 571-580;
Fletcher Equity Pl. & C., pages 64, 65, §44;
Miller v. *Robertson U. S. Sup. Co.*, Nov. 17, 1924;
Mo. Pac. Ry. Receivership (268 U. S., 90);
Kuppendorf v. *Hyde* (110 U. S., 276);
Freeman v. *Howe* (24 How., 456);
Loughborough v. *McNevin*, 74 Cal., 250; 14 Pac., 369;
Walker v. *Sanders*, 103 Minn., 124;
Leary v. *U. S.*, 224 U. S., 567;
Bank of Augusta v. *Earle*, 13 Pet., 590;
Smith v. *Gale*, 144 U. S., 517-521.

It will be observed that the interventions of the N. Y. Receiver in the suit as the successor to the title of the defendant judgment-debtor's interest in the sequestered property would have removed the two questions, which were raised against the plaintiffs and upon which the bill was dismissed, to wit, French reciprocity, and as to the claims arising "with reference to such sequestered property" since those questions do not arise under the Act, in the case of an American citizen claimant, such as the Receiver. Sec. 9 (e).

The case was a proper one for joining the Receiver in the suit, both on his application and that of the plaintiffs and the applications were improperly denied.

Leary v. *U. S.*, 224 U. S., 569;
Kuppendorf v. *Hyde*, 110 U. S., 276.

The defendant James counsel makes three objections to the acquisition of the property by the Receiver which he apparently deems insuperable.

The 1st Objection as he stated it in his brief below is that the Receiver could not be vested with title to any claim prior to the date of the first order appointing him, because Section 9 of the Act requires that the debt asserted must be owing to and owned by the claimant prior to Oct. 6, 1917.

The answer to this is that the Receiver is not a "claimant" of the property in the sense of the Statute. He takes his title by operation of law, *and stands in the debtor's shoes,* enforcing the claim she has made against the Custodian. This provision does not apply to a claimant under Sec. 9 b-3 or c, and of course not to the Receiver to whom sub-section (e) does not apply.

The 2nd Objection made is that, "Under the New York "Statute, the Receiver in supplementary proceedings takes "no title to property except from levy and sale under an "execution."

This is a remarkable statement and is not the law of New York at all.

The Receiver may bring suits in all cases to recover the property, and in some cases the court may make a peremptory order for the delivery of the property at the conclusion of the examinations.

Civ. Prac. Act., Section 793, 809.

The 3rd Objection made is that Section 777 of the N. Y. Civil Prac. Act does not authorize the seizure by the Receiver of property exempt from executions. This property is not exempt under the New York law. We have discussed the question above of the effect of Section 9 (f) of the Trading with the Enemy Act and maintained that the effect of that Sub-section is merely to stay collateral attack on sequestered property, and relegate claimants to suits in the Courts of Equity designated by this Act.

Construction of the Act.

The general rule of statutory construction laid down by Justice Miller in the Slaughter House cases is expressed in the following language:

> "But what we do say, and what we wish to be understood, is that in any fair and just construction of any section or phrase of these amendments it is necessary to look to the purpose which we have said was the prevailing spirit of them all, and the evil which they were designed to remedy."

The Trading with the Enemy Act's object was to prevent property from being used to fight the United States or its Allies. It was dictated by the same policy which was advocated in the Roman Senate at the time of the expulsion from Rome of the Tarquins, when they petitioned to be allowed to take their property and its proceeds with them, and a Senator declared that, "the treasure of the Tarquins should be made to fight for the Republic rather than against it."

U. S. v. *Padelford* (9 Wall, 531);
Am. Exchange Bank v. *Palmer* (256 Fed R., 880).

As was said in *Keppleman* v. *Keppleman,* 103 Atl. R., 27:

> "The Act must be construed in the light of its purposes, *first,* to prevent Acts resulting in detriment to the United States in war; and *second, not to permit* or compel Acts resulting in injury to individual aliens without benefit to the U. S."

In *Am. Exchange Bank* v. *Palmer* (256 Fed R., 680), the Court of Appeals said:

> "Realizing that it was impossible to foresee all the questions and contingencies that would arise under

the Act, Congress confided to the U. S. Courts powers of a most comprehensive character in Sec. 17 (Sec. 3115½), which reads as follows:

'That the District Courts of the United States are hereby given jurisdiction to make and enter * * * all such orders and decrees, and to issue such process as may be necessary and proper in the premises to enforce the provisions of this Act, with a right of appeal from the final decree or order of such court as provided in Sections 128 and 336 of March 3, 1911, entitled An Act to Codify, revise and amend the laws relating to the judiciary.' "

To employ the Act to protect an enemy alien from the judgment of an American Court rendered in favor of citizens of a faithful ally, which accords the fullest protection to American citizens in its courts, is to grossly pervert its purposes.

Miller v. *Robinson*, 266 N. Y., 457;
Behn Meyer v. *Miller, Custodian*, 266 U. S., 263;
Swiss Nat. Ins. Co. v. *Miller*, 267 U. S., 73.

The Relief Prayed For.

The appellants, Pauline Andree de la Mettrie and George Pratt de Gasquet James, pray that the decree of the Court of Appeals of the District of Columbia be reversed, and a new trial ordered with costs.

The appellant, David Keane, Receiver, prays that the judgment the Court of Appeals of the District of Columbia denying his motion to intervene in the action be reversed with costs and the trial court directed to grant such motion, with costs to the appellant.

And the appellants pray for such other and further relief on this appeal as may to this court seem just.

J. NOBLE HAYES,
GUY H. JOHNSON,
Attorneys for Appellants.

WITHDRAWN

FILED
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WM. R. STANSBURY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1925.

No. [redacted] 54

PAULINE ANDRE DE LA METTRIE AND GEORGE PRATT DE GASQUET JAMES, APPELLANTS,

against

ELIZABETH PRATT DE GASQUET JAMES, THOMAS W. MILLER, AS ALIEN PROPERTY CUSTODIAN, AND FRANK WHITE, AS TREASURER OF THE UNITED STATES,

AND

No. [redacted] 55

DAVID KEANE, RECEIVER, APPELLANT,

against

ELIZABETH PRATT DE GASQUET JAMES, THOMAS W. MILLER, AS ALIEN PROPERTY CUSTODIAN, AND FRANK WHITE, AS TREASURER OF THE UNITED STATES,

---

BRIEF ON BEHALF OF ELIZABETH PRATT DE GASQUET JAMES, APPELLEE.

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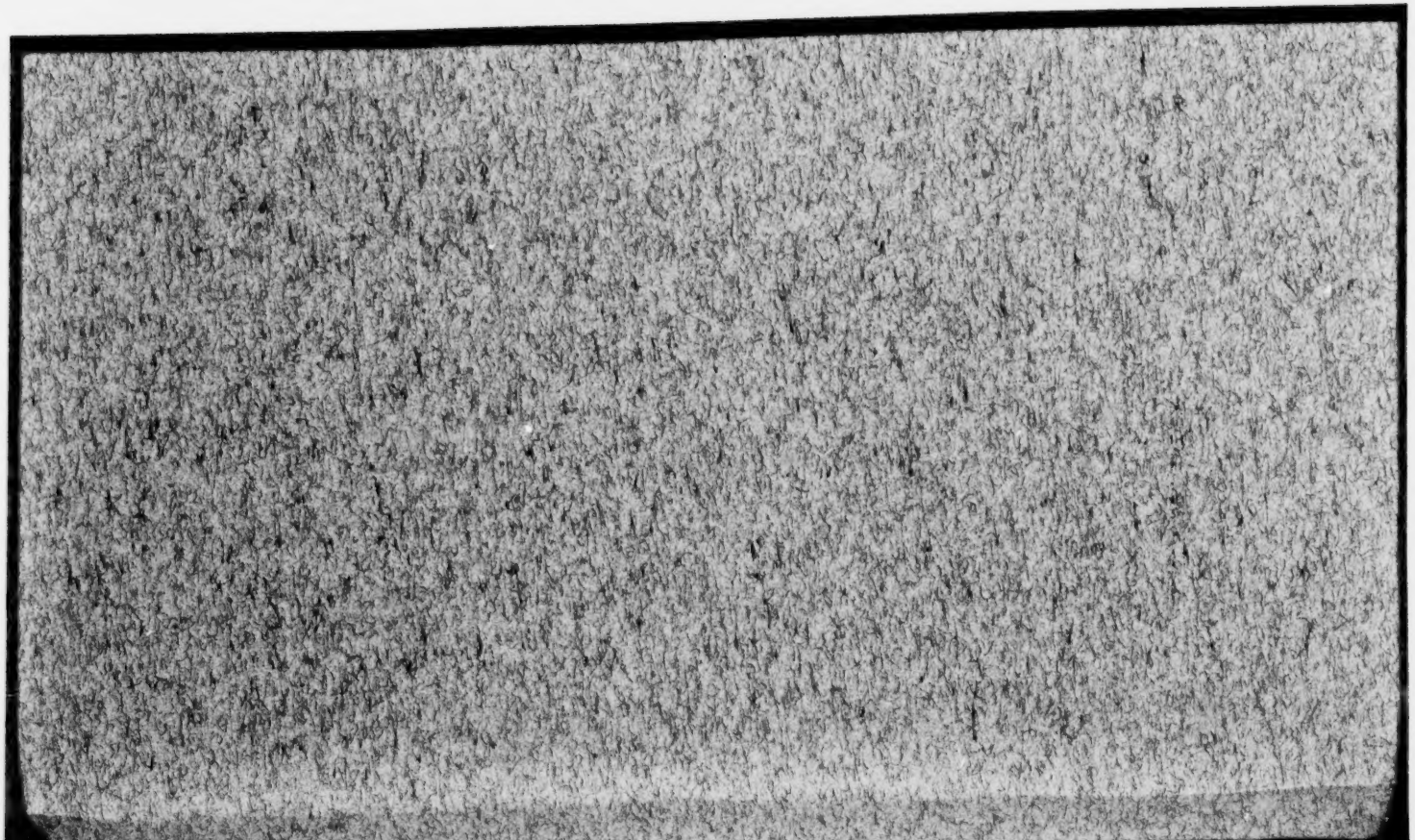

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1925.

No. 346.

PAULINE ANDRE DE LA METTRIE AND GEORGE PRATT DE GASQUET JAMES, APPELLANTS,

against

ELIZABETH PRATT DE GASQUET JAMES, THOMAS W. MILLER, AS ALIEN PROPERTY CUSTODIAN, AND FRANK WHITE, AS TREASURER OF THE UNITED STATES,

AND

No. 347.

DAVID KEANE, RECEIVER, APPELLANT,

against

ELIZABETH PRATT DE GASQUET JAMES, THOMAS W. MILLER, AS ALIEN PROPERTY CUSTODIAN, AND FRANK WHITE, AS TREASURER OF THE UNITED STATES,

---

BRIEF ON BEHALF OF ELIZABETH PRATT DE GASQUET JAMES.

Statement of the Case.

There are presented in one record two appeals, one brought by the plaintiffs, De La Mettrie and James, in No. 346 and the other brought by David Keane, as receiver, in No. 347.

The appellants in No. 346 brought a bill in equity in the Supreme Court of the District of Columbia against the Alien Property Custodian and Treasurer of the United States to enforce the collection of the judgments which they had recovered in the Surrogate's Court of Ulster County, in the State of New York, out of property of Elizabeth P. De Gasquet James (their judgment debtor) which had been sequestrated by the Alien Property Custodian. A decree was entered December 5, 1923, by the Supreme Court of the District of Columbia, dismissing the bill of complaint (Record, pp. 16, 17), and from this decree appeal was taken to the Court of Appeals of the District of Columbia, where the decree below was affirmed March 2, 1925.

David Keane was appointed receiver in supplementary proceedings in the State of New York, such proceedings being instituted supplementary to the executions issued by the appellants in No. 346 upon their judgments. Keane as receiver applied to the Supreme Court of the District of Columbia to be made a party to the first-mentioned cause, and his motion for intervention was denied (Record, p. 54), and a motion made by the appellants in No. 346 to amend their pleadings by bringing him in as a party was also denied (Record, p. 64).

On appeal to the Court of Appeals of the District of Columbia, the action of the Supreme Court of the District of Columbia was affirmed March 2, 1925.

From the judgments of affirmance of the Court of Appeals of the District of Columbia the appellants have prosecuted the present appeals.

Appeal of De La Mettrie and James, No. 346.

STATEMENT OF FACTS.

The facts in this case are so clearly stated in the brief submitted on behalf of the Alien Property Custodian and the Treasurer of the United States that a repetition of them here is unnecessary.

Certain other facts are set forth in this brief in connection with the points of the argument.

ARGUMENT.

I.

The Debt Alleged to be Owing to the Appellants Does Not Arise with Reference to the Moneys or Other Property Held by the Alien Property Custodian or the Treasurer of the United States Under the Terms and Provisions of the Trading with the Enemy Act, as Amended.

It is respectfully submitted that the case of *Banco Mexicano* v. *Deutsche Bank,* 263 U. S., 591, affirming the judgment of this Court reported at 289 Fed. Rep., 924, is conclusive on this point.

The argument made in behalf of the other appellees is adopted as the argument in behalf of the appellee James. The facts concerning the origin of the debt and the property seized are set forth in the stipulation which was entered into between the appellants and this appellee (Record, p. 68).

It appears from this stipulation, at the bottom of Record page 68, that Amedee De Gasquet James, the former husband of this appellee and father of the appellants, died on July 28, 1903, in France (Record, pp. 69, 4); that in a proceeding for the judicial settlement of the accounts of appellee James as executrix of her husband's estate, entered in the office of the Surrogate of Ulster County, in the State of New York, on March 21, 1915, judgments were entered against the appellee James and in favor of the appellants. These judgments were subsequently reversed by the Appellate Division of the Supreme Court of the State of New York; the judgment of the Appellate Division was in turn reversed and the Surrogate's decree modified, and as modified affirmed by the Court of Appeals of the State of New York; and thereafter a decree in accordance with the final decision of the Court of Appeals was entered in said Surrogate's Court on November 3, 1917. By the judgments as thus modified each of the appellants was awarded a judgment against this appellee in the sum of $65,133.25 [Record, p. 70 (5)].

In the year 1887 (sixteen years prior to her husband's death), the appellee James, out of her own property, amounting to about $135,000, entered into a trust agreement with The Farmers' Loan and Trust Company, a copy of which is attached to the stipulation (Record, p. 72), by which she reserved to herself an estate for life, in trust, with remainder over to her four children. This was a voluntary trust created out of her own property (Record, pp. 71, 6). It was the interest of appellee under this trust deed and a deposit which consisted of income derived from it and

certain bonds which are of little or no value, but which are not shown to have any connection whatever with the estate of Amedee De Gasquet James, that were seized by the Alien Property Custodian on or about May 20th, 1918 [Record, p. 71 (6)].

It therefore appears affirmatively from this stipulation, which is an admission at least upon the part of the appellants that their claims do not arise with reference to the money or to the property held by the Alien Property Custodian or Treasurer of the United States.

It appears that subsequently to the seizure by the Alien Property Custodian, executions upon these judgments were issued out of the Surrogate's Court of Ulster County. The first of these executions was issued October 18, 1920.

Neither the docketing of the judgments on December 20, 1919 [Record, p. 70 (5)] in New York County, nor the issuance of the executions effected any lien or charge upon the property which the Alien Property Custodian had already seized.

This conclusion has been asserted by the United States Circuit Court of Appeals, Second Circuit, in an appeal made by these same appellants upon the same judgments for leave to intervene in a suit in the United States District Court for the Eastern District of New York, entitled *Aronstam* v. *James*. Three opinions were rendered by the courts upon this application. They will be found reported under the title of *Aronstam* v. *James*, 273 Fed. Rep., 545; 273 Fed. Rep., 548 (being the two in the District Court), and 273 Fed.

Rep., 688 (being the opinion of the Circuit Court of Appeals). In this latter opinion the Court says among other things:

> "Aronstam's suit is under section 9 of the Trading with the Enemy Act (Comp. St. 1918, Com. St. Ann. Supp. 1919 3115½e), and the funds of the respondent Mrs. James are in the treasury of the United States awaiting the determination of it. The petitioners had no lien upon these funds under section 1405 of the Code of Civil Procedure of New York, because they are not chattels nor subject to levy by execution."

So far as any point may be made by the appellants that the action of Mr. Justice Hoehling in denying a motion to dismiss the cause on motion, in some way determined the law of the case, in addition to what the other appellees in their brief may say about this we would call attention to the fact that the appellee James was not a party to this motion. The order denying the motion was entered October 20th, 1921, and her answer was not filed until November 22nd, 1921 (Record, p. 13).

There is a suggestion in appellants' brief that appellee James' property was seized because she was an alien enemy. This is an error. Her property was sequestered because she was in enemy territory—Austria—although she was an American citizen. Her marriage to a German had been annulled prior to the seizure [Record, p. 69 (2)]. In the Aronstam case she was not held to be an "alien enemy" but "to be

an enemy within the meaning of the said Trading with the Enemy Act" (Record, p. 77).

She did not apply to have her property returned under the section of the law referred to on page 4 of appellants' brief, because she could not, she was not at the time of the seizure of her property nor at the time of her application, the wife of a subject or citizen of Germany or Austria-Hungary. The suggestion that the sequestration was about to be lifted (appellants' brief, p. 4), finds no support in the record and the allegation contained in Record on page 42 at folio 74 is denied (Record, p. 50). The stipulation (Record, 72, p. 13), only states that this appellee has filed her claim for the return of her property.

II.

The Dismissal of the Bill Herein by the Trial Court on the Ground that France had Not Extended Reciprocal Rights as Required as a Prerequisite for Such an Action Under the Trading with the Enemy Act, as Amended, is Correct.

This point is very fully argued by the other appellees in this case and we are quite content to rest our argument upon their brief and with the conclusions of the trial court, found printed in the record, pages 136, 137, 138, and 143, where the Court said:

> "I hold, as a matter of fact, that in a case of this kind there was no reciprocity, because as I read the testimony of the two French experts, I believe it is the law of France, and they testify

> to it, that American citizens could not go to France now and establish—not file; anybody can file a claim—but could not go and establish a claim on these facts against the sequestered property in France."

And after reviewing the testimony of Le Paulle and Pellerin, the two experts on French law, continued:

> "So, I find as a fact that while the law of France is that an allied—I suppose we have to call ourselves an 'associated' power—while the citizen of an allied or neutral power has exactly the same rights in the French courts as a Frenchman has, to that extent there is reciprocity, I do not think there is any power in the French Court to let a French citizen recover under those circumstances. In other words, there isn't any reciprocity as to the particular thing that we have under consideration here."

The statement on page 5 of appellants' brief is not complete because the defendant James raised the question as to the accord of reciprocal rights by the Government of France. Issue was duly taken on these allegations in her answer (par. XI, Record, p. 34).

Appeal of David Keane, Receiver, No. 347.

The application of the Receiver David Keane, appellant, for leave to intervene in the pending action and the motion of appellants to bring him in as a party were properly denied.

It appears that by an order of a Justice of the Supreme Court of the State of New York, made on the 18th day of June, 1923, in the matter of the proceedings instituted by George Pratt De Gasquet James, as judgment-creditor, David Keane was appointed receiver in proceedings supplementary to execution on the judgment recovered by the said George Pratt De Gasquet James, which judgment is the basis of the present suit, so far as he is concerned (Record, p. 43).

By order of the County Judge of Oneida County, New York, in proceedings supplementary to execution instituted by Pauline Andree de la Mettrie, as judgment-creditor, this receivership was extended to that proceeding. The order was made on the 28th day of July, 1923, and it was based upon the judgment set out by the appellant, de la Mettrie, as the basis of her suit in the case at bar (Record, p. 45).

Both of these orders were made in what is known as third party proceedings—that is to say, were entered in proceedings instituted against persons supposed to have in their possession property of the judgment-debtor. It is recited in the first order that the judgment-debtor was not served with notice of the application of the order because she was not in the

State of New York and now resides and has for many years resided in Europe (Record, p. 44). A similar recital is made in the order of the County Judge (Record, p. 45).

The denial of the intervention of the receiver may be supported upon either one of three grounds:

(1) The receiver in any event was not vested with title to any claim prior to the date of the first order appointed him receiver—that is to say, June 18, 1923.

Section 9, subdivision (*e*), of the Trading with the Enemy Act provides that no matter who the claimant may be, the debt asserted must "be owing to and owned by the claimant prior to October 6, 1917." Inasmuch as the claim in question was not owned by the receiver prior to the date mentioned, he could not assert any rights in this Court based on such a claim.

(2) Under the New York Statute, the receiver in suplementary proceedings takes no title to property exempt from levy and sale under an execution.

Section 777 of the Civil Practice Act of New York (formerly Section 2463, Code of Civil Procedure) provides:

> "This article (relating to Proceedings Supplementary to Execution) does not authorize the seizure of, or other interference with, any property which is expressly exempt by law from levy and sale by virtue of an execution."

The property involved in the present case is expressly exempt from levy and sale under an execution

under subdivision (*f*) of Section 9 of the Trading with the Enemy Act, which reads as follows:

> "(*f*) Except as herein provided, the money or other property conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian, shall not be liable to lien, attachment, garnishment, trustee process, or execution, or subject to any order or decree of any court."

(3) The receiver in supplementary proceedings appointed in New York State cannot maintain an action in the Supreme Court of the District of Columbia.

The leading case among the Federal decisions is that of *Booth* v. *Clark* (1855), 58 U. S., 322, in which it was held that a receiver appointed under a creditor's bill in the State of New York, could not sue in the United States Circuit Court for the District of Columbia. The court said at page 167:

> "Whatever may be the operation of the decree in respect to the receiver's powers over the property of the debtor within the State of New York, and his right to sue for them there, we do not find anything in the cases in the New York Reports showing the receiver's right to represent the creditor or creditors of the debtor in a foreign jurisdiction. It is true that the receiver in this case is appointed under a statute of the State of New York, but that only makes him an officer of the court for that State. He is a representative of the court, and may, by its direction, take into his possession every kind of property which may be taken in execution, and also that which is equitable, if of a nature to be reduced into possession."

There was added by what is now known as the Code of Procedure of New York, the first part of which was adopted in 1848, a chapter which was entitled Proceedings Supplementary to Execution, which provided a substitute for the bill in chancery. The various provisions of the code authorizing these proceedings were to be considered as a scheme to take the place of the former bill in chancery (*I. & T. N. Bank* v. *Quackenbush*, 143 N. Y., 567, 573).

In the case of *Lynch* v. *Johnson*, 48 N. Y., 27, it was stated that:

> "Proceedings under Sections 292 and 294 of the Code are parts of the same scheme for the collection of debts inaugurated by the Code. These sections furnish a simple substitute for the creditor's bill, as formerly used in Chancery."

The nature of the proceedings supplementary to execution and the position of a receiver therein under the provisions of the statutes of New York have been described in various ways. In the case of *Mulstein Co.* v. *City of New York*, 213 N. Y., 308, at page 314, the court said:

> "The issuing of an execution upon a judgment is a proceeding in the suit, and so are the proceedings supplementary thereto (*Wegman* v. *Childs*, 41 N. Y., 159; *Ward* v. *Roy*, 69 N. Y., 96). Those decisions, it is true, were made prior to the passage of said Section 2433 of the Code of Civil Procedure. None the less I think that as far as the question before us is concerned,

> the proceeding though for some purpose a special proceeding, is still but supplementary to the execution and in aid of the judgment."

Again in *Matter of Boucker Co.* v. *Callahan Co.*, 218 N. Y., 321 at page 324, the Court said:

> "A receiver appointed under the General Corporation Law acts for the benefit of all the creditors of the corporation, who are thus assured that no one will acquire a preference over any other in the distribution of its assets; whereas a receiver in supplementary proceedings represents only the creditor who procured his appointment and such others as may have caused the receivership to be extended to their claims, each becoming entitled to payment in full in the order of diligence."

The receiver in this present case, therefore, occupies no better position than the receiver in the case of *Booth* v. *Clark*.

The case of *Booth* v. *Clark* has been uniformly followed in the Supreme Court of the United States. See the case of *Sterrett* v. *Second National Bank*, 248 U. S., 74, at page 76.

The cases in which the courts of the United States have recognized the right of a foreign receiver to sue in the Federal Courts have been cases of statutory receivers of corporations or analogous instances. We have been unable to find and we do not believe that there is an instance in which the receiver of an individual, appointed in proceedings supplementary to execution or under a creditor's bill, by virtue of his ap-

pointment has been allowed to maintain an action in a Federal court. The only method in which rights can be asserted in those courts are by the original creditors and not by the receivers.

In the foregoing argument we have included everything contained in our brief in the Court of Appeals of the District of Columbia in reference to the receiver's petition of intervention. A consideration will show that the criticism made by appellants at the bottom of page 59 of their brief must be due to misunderstanding of an argument.

Conclusion.

The decree of the Court of Appeals of the District of Columbia affirming the decree dismissing the bill of complaint of the appellants in No. 346 and the order denying the motion of the receiver to intervene in No. 347 should be affirmed.

Respectfully submitted,

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Supreme Court of the United States

OCTOBER TERM, 1920.

No. 356.

PAULINE ANDRE DE LA METTRIE and GEORGE PRATT DE GASQUET JAMES, *Appellants*,

against

ELIZABETH PRATT DE GASQUET JAMES, THOMAS W. MILLER, as Alien Property Custodian, and FRANK WHITE, as Treasurer of the United States,

and

No. 357.

DAVID KRANE, Receiver, *Appellant*,

against

ELIZABETH PRATT DE GASQUET JAMES, THOMAS W. MILLER, as Alien Property Custodian, and FRANK WHITE, as Treasurer of the United States.

SUPPLEMENTAL BRIEF ON BEHALF OF ELIZABETH PRATT DE GASQUET JAMES, APPELLEE.

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IN THE

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1925.

No. 346.

PAULINE ANDRE DE LA METTRIE and GEORGE PRATT DE GASQUET JAMES, Appellants,

against

ELIZABETH PRATT DE GASQUET JAMES, THOMAS W. MILLER, as Alien Property Custodian, and FRANK WHITE, as Treasurer of the United States,

and

No. 347.

DAVID KEANE, Receiver, Appellant,

against

ELIZABETH PRATT DE GASQUET JAMES, THOMAS W. MILLER, as Alien Property Custodian, and FRANK WHITE, as Treasurer of the United States.

SUPPLEMENTAL BRIEF ON BEHALF OF APPELLEE, ELIZABETH PRATT DE GASQUET JAMES.

In addition to the three grounds stated in the main brief on behalf of appellees (pages 10 to 14 inclusive), there are three additional reasons why the present peti-

tion of Keane as Receiver to intervene, and of the appellants, de la Mettrie and George James, to amend their bill of complaint so as to make him a party, would not be allowed even in a Federal Court sitting in the State of New York. It therefore becomes unnecessary to consider whether a New York receiver in supplementary proceedings may exercise his power and sue in a foreign jurisdiction.

(A) In the first place, the intervention of Keane as Receiver in supplementary proceedings would be directly in the teeth of Subdivision (f) of Section 9 of the Trading with the Enemy Act.

Under the New York Statute it is true that a receiver in supplementary proceedings takes the legal title to all the personal property of the debtor, as well as the right to recover by judicial process property transferred by the judgment debtor in fraud of creditors; he is the receiver of the property of the judgment debtor, not of the judgment creditor.

Ward v. *Petrie*, 157 N. Y. 301, 307, 309 (1898)

But any action by the receiver to recover property of the judgment debtor is merely one step towards execution upon it in satisfaction of the judgment of the creditor on whose petition the receiver is appointed.

If Keane as Receiver be allowed to intervene and to charge any of the property in the hands of the Custodian with the judgment owned by the creditors on whose petition he was appointed, such intervention will be granted purely in aid of such judgment by way of execution upon the property of the defendant James in the hands of the Alien Property Custodian. Furthermore, any money or property paid or transferred to Keane as Receiver would be held by him subject to the order of the New York courts which appointed him. But Subdivision (f)

of Section 9 of the Trading with the Enemy Act (C. 241, 41 Stat. 980) provides, as we have already seen in the main brief on behalf of the appellee James,

> "(f) Except as herein provided, the money or other property conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian, shall not be liable to lien, attachment, garnishment, trustee process, or execution, or subject to any order or decree of any court."

The proposed intervention of the Receiver must therefore be denied upon this additional ground.

(B) Secondly, such intervention even in New York would violate Subdivision (e) of Section 9 of the Trading with the Enemy Act (C. 241, 41 Stat. 980). A New York receiver in supplementary proceedings has no greater right to the property of the judgment debtor than the creditor on whose petition he was appointed.

Kennedy v. *Thorp*, 51 N. Y. 174 (1872).

The two judgment creditors, Pauline de la Mettrie and George Pratt de Gasquet James, on whose petition the appellant Keane was appointed receiver, were, at the date of asserting the debt, and still are, admittedly citizens of France (Rec., fol. 122, pp. 68, 69). As we have shown in our main brief (pages 3 to 8 inclusive), the judgment creditors are unable to meet two requirements of Subdivision (e) of Section 9 of the Trading with the Enemy Act (C. 241, 41 Stat. 980) applicable to them, namely:

> 1. that the debt must have arisen with reference to the money or property in the hands of the Custodian or the Treasurer of the United States; and
>
> 2. that the nation of which the claimant is a citizen shall extend reciprocal rights to citizens of the United States.

Subdivision (e) of Section 9 of the Trading with the Enemy Act reads as follows:

> "No money or other property shall be returned nor any debt allowed under this section to any person who is a citizen or subject of any nation which was associated with the United States in the prosecution of the war, unless such nation in like case extends reciprocal rights to citizens of the United States; nor in any event shall a debt be allowed under this section unless it was owing to and owned by the claimant prior to October 6, 1917, and as to claimants other than citizens of the United States unless it arose with reference to the money or other property held by the Alien Property Custodian or Treasurer of the United States hereunder."

Since the judgment creditors, on whose petition Keane, the Receiver, was appointed, are unable to assert such rights, the Receiver himself cannot do so—for he stands in their shoes. Therefore, the petition of the Receiver for intervention must be denied. Any other conclusion would be but a sign post to a highway leading to the constant evasion of Subdivision (e) of Section 9 of the Trading with the Enemy Act, would render its prohibitions wholly nugatory, and would permit to be accomplished indirectly what is directly forbidden.

(C) An order denying leave to intervene is interlocutory and is not appealable.

It is settled law that the denial of a petition for leave to intervene is an exercise of discretionary power. It is not final in its character and is not appealable.

Credits Commutation Co. v. *United States*, 177 U. S. 311;
Ex parte Cutting, 94 U. S. 14.

CONCLUSION.

Summarizing both our main brief and this supplemental brief as to the intervention of Keane as Receiver, the decision of the Court of Appeals of the District of Columbia, denying the petition of the Receiver to intervene, and of the appellants de la Mettrie and George James to amend their bill of complaint so as to make him a party, should be affirmed, for:

1. To allow Keane as Receiver to urge any claim against the property of Mme. James in the hands of the Alien Property Custodian would violate Subdivision (f) of Section 9 of the Trading with the Enemy Act, which exempts property in the hands of the Custodian from outside judicial interference.

2. Keane as Receiver has no greater rights than the judgment creditors on whose petition he was appointed, and being citizens of France, their rights are limited by two requirements of Subdivision (e) of Section 9 of that Act (neither of which is met):

(a) that the claim must have risen with respect to the property in the hands of the Custodian; and

(b) as to reciprocity.

3. The debt asserted by Keane as Receiver was neither owing to nor owned by the claimant prior to October 6, 1917, as required by Subdivision (e) of Section 9, irrespective of the residence or nationality of the claimant.

4. Keane as Receiver, under Section 777 of the New York Civil Practice Act, takes no title to property in the hands of the Custodian, for it is exempt from execution.

5. Keane, a receiver in supplementary proceedings appointed in the State of New York, cannot maintain an action in the Supreme Court of the District of Columbia.

6. The denial of a motion to intervene is interlocutory and is not appealable.

The decree of the Court of Appeals of the District of Columbia denying the motion of the Receiver to intervene should be affirmed.

Respectfully submitted,

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Supreme Court of the United States

OCTOBER TERM, 1926.

No. 54.

PAULINE ANDRE DE LA METTRIE AND GEORGE PRATT DE GASQUET JAMES, APPELLANTS,

against

ELIZABETH PRATT DE GASQUET JAMES, THOMAS W. MILLER, AS ALIEN PROPERTY CUSTODIAN, AND FRANK WHITE, AS TREASURER OF THE UNITED STATES,

AND

No. 55.

DAVID KEANE, RECEIVER, APPELLANT,

against

ELIZABETH PRATT DE GASQUET JAMES, THOMAS W. MILLER, AS ALIEN PROPERTY CUSTODIAN, AND FRANK WHITE, AS TREASURER OF THE UNITED STATES.

BRIEF ON BEHALF OF ELIZABETH PRATT DE GASQUET JAMES, APPELLEE.

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In the

SUPREME COURT OF THE UNITED STATES

October Term, 1926.

No. 54.

Pauline Andre De La Mettrie and George Pratt De Gasquet James, Appellants,

against

Elizabeth Pratt De Gasquet James, Thomas W. Miller, as Alien Property Custodian, and Frank White, as Treasurer of the United States

and

No. 55.

David Keane, Receiver, Appellant,

against

Elizabeth Pratt De Gasquet James, Thomas W. Miller, as Alien Property Custodian, and Frank White, as Treasurer of the United States.

BRIEF ON BEHALF OF APPELLEE, ELIZABETH PRATT DE GASQUET JAMES.

Statement of the Case.

There are presented in one record two appeals, one brought by the plaintiffs, De La Mettrie and James, in No. 54 and the other brought by David Keane, as receiver, in No. 55.

The appellants in No. 54 brought a bill in equity in the Supreme Court of the District of Columbia against the Alien Property Custodian and Treasurer of the United States to enforce the collection of the judgments which they had recovered in the Surrogate's Court of Ulster County, in the State of New York, out of property of Elizabeth P. De Gasquet James (their judgment debtor) which had been sequestrated by the Alien Property Custodian. A decree was entered December 5, 1923, by the Supreme Court of the District of Columbia, dismissing the bill of complaint (R. 16, 17), and from this decree appeal was taken to the Court of Appeals of the District of Columbia, where the decree below was affirmed March 2, 1925.

David Keane was appointed receiver in supplementary proceedings in the State of New York, such proceedings being instituted supplementary to the executions issued by the appellants in No. 54 upon their judgments. Keane as receiver applied to the Supreme Court of the District of Columbia to be made a party to the first-mentioned cause, and his motion for intervention was denied (R. 54), and a motion made by the appellants in No. 54 to amend their pleadings by bringing him in as a party was also denied (R. 64).

On appeal to the Court of Appeals of the District of Columbia, the action of the Supreme Court of the District of Columbia was affirmed March 2, 1925.

From the judgments of affirmance of the Court of Appeals of the District of Columbia the appellants have prosecuted the present appeals.

Appeal of De La Mettrie and James, No. 54.

Statement of Facts.

The facts upon which the appellants must rely in order to recover are recited in the amended bill of complaint (R. 2) which was filed in the Supreme Court of

the District of Columbia, the alleged grounds for the jurisdiction of that court being Section 9 of the Trading with the Enemy Act as amended June 5, 1920 (c. 241, 41 Stat. 977).

Many the facts are contained in a stipulation entered into between the appellants and this appellee (R. 68 to 75).

The appellants are citizens and residents of the Republic of France. (R. 2.)

On March 21, 1915, a final decree and judgment were entered in the Surrogate's Court of Ulster County in the State of New York, wherein it was ordered, adjudged, and decreed that the appellee Elizabeth Pratt de Gasquet James pay the sum of $69,754.85 to the present appellant Pauline Andre de la Mettrie, and an equal amount to the appellant George Watson Pratt de Gasquet James. (R. 3.)

After appeals to the appellate division of the Supreme Court of New York and to the Court of Appeals of the State of New York from the said final decree and judgment of the Surrogate's Court, judgment of the Surrogate's Court was affirmed and modified, and as so affirmed and modified was resettled on November 3, 1917, and by decree entered in the office of the Surrogate on that day, the appellee James was ordered to pay to the appellant Pauline Andre de la Mettrie $65,133.25, and an equal amount to the appellant George Watson Pratt de Gasquet James. The judgment of the Surrogate's Court was docketed in the office of the Clerk of the City and County of New York on December 20, 1919. (R. 3.)

On November 5, 1918, the Alien Property Custodian seized and took into his possession certain property of the appellee James in the City of New York, which property was in the possession or under the control of The Farmers' Loan and Trust Company. (Rec. bot. p. 3 and top p. 4.)

On October 18, 1920, execution was issued upon the said judgment of the Surrogate's Court in favor of the appellants to the sheriff of the City and County of New

York, directing him to satisfy the judgment in favor of the appellants out of the property of the said James within the County of New York. This execution was lodged with the sheriff on October 27, 1920. Like executions were issued thereafter, the last execution being dated February 26, 1921, and lodged with the sheriff March 4, 1921. All of these executions were returned by the sheriff unsatisfied. (R. 4.)

In the year 1887 (sixteen years prior to her husband's death), the appellee James, out of her own property, amounting to about $135,000, entered into a trust agreement with The Farmers' Loan and Trust Company, a copy of which is attached to the stipulation (R. 72), by which she reserved to herself an estate for life, in trust, with remainder over to her four children. This was a voluntary trust created out of her own property (R. 71, 6). It was the interest of appellee under this trust deed and a deposit which consisted of income derived from it and certain bonds which are of little or no value, but which are not shown to have any connection whatever with the estate of Amedee De Gasquet James, that were seized by the Alien Property Custodian on or about May 20th, 1918 [R. p. 71 (6)].

On April 22, 1920, the appellants filed their respective notices of claim with the Alien Property Custodian, and on May 29, 1920, filed their applications for the allowance of such claims. The claims of the appellants were disallowed on July 29, 1920. (R. 5 and 6.) Thereafter the claims were again submitted to the President and were, on May 21, 1921, disallowed.

The amended bill of complaint was filed in the Supreme Court of the District of Columbia on July 20, 1921. (R. top 2.)

The bill of complaint prays that the Alien Property Custodian and the Treasurer of the United States be ordered to pay to each of the appellants, Pauline Andre de la Mettrie and George Watson de Gasquet James, the

sum of $65,133.25, out of any money in their possession, which was or is the property of the defendant Elizabeth Pratt de Gasquet James.

It was stipulated that the appellants Mettrie and James filed their respective notices of claim under Section 9 of the Trading with the Enemy Act on or about April 22, 1920, and that upon May 22, 1920, application was made for the allowance of said claims, and that the claims were disallowed on or about July 29, 1920.

Summarized, the facts are simply these: The appellants Mettrie and James, citizens and residents of the Republic of France, are judgment creditors of the appellee James, whose money or other property has been seized and is held by the Alien Property Custodian and the Treasurer of the United States, and the appellants Mettrie and James seek to have the amount of their judgment debts paid from the assets of the appellee James, in the possession of the Custodian and the Treasurer.

Summary of Argument.

Under Section 9 of the Trading with the Enemy Act, as amended, the appellants, French citizens, in order to be entitled to recover any debt due to them by the appellee James, must show both (a) that the debt arose "with reference to the money or other property held by the Alien Property Custodian, or Treasurer of the United States hereunder"; and (b) that the Republic of France "in like case extends reciprocal rights to citizens of the United States." [Section 9, subdivision (e)].

The appellants are unable to meet either of these requirements.

ARGUMENT.

I.

The debt alleged to be owing to the appellants does not arise with reference to the moneys or other property held by the Alien Property Custodian or the Treasurer of the United States under the terms and provisions of the trading with the Enemy Act, as amended.

It is respectfully submitted that the case of *Banco Mexicano* v. *Deutsche Bank*, 263 U. S. 591, affirming the judgment of this Court reported at 289 Fed. 924, is conclusive on this point.

The facts concerning the origin of the debt and the property seized are set forth in the stipulation which was entered into between the appellants and this appellee (R. 68).

It appears from this stipulation, at the bottom of Record page 68, that Amedee De Gasquet James, the former husband of this appellee and father of the appellants, died on July 28, 1903, in France (R. 69, 4); that in a proceeding for the judicial settlement of the accounts of appellee James as executrix of her husband's estate, entered in the office of the Surrogate of Ulster County, in the State of New York, on March 21, 1915, judgments were entered against the appellee James and in favor of the appellants. These judgments were subsequently reversed by the Appellate Division of the Supreme Court of the State of New York; the judgment of the Appellate Division was in turn reversed and the Surrogate's decree modified, and as modified affirmed by the Court of Appeals of the State of New York; and

thereafter a decree in accordance with the final decision of the Court of Appeals was entered in said Surrogate's Court on November 3, 1917. By the judgments as thus modified each of the appellants was awarded a judgment against his appellee in the sum of $65,133.25 [R. p. 70 (5)].

In the year 1887 (16 years prior to her husband's death), the appellee James, out of her own property, created a trust with The Farmers' Loan and Trust Company, preserving to herself, the income thereon for life. The property seized by the Alien Property Custodian on or about May 20, 1918, consisted of this life interest, together with a deposit which comprised income derived from this trust and certain bonds of little or no value. None of this property is shown to have any connection with the estate of Amedee de Gasquet James.

Subdivision (e) of Section 9 of the Trading with the Enemy Act reads as follows:

> "No money or other property shall be returned nor any debt allowed under this section to any person who is a citizen or subject of any nation which was associated with the United States in the prosecution of the war, unless such nation in like case extends reciprocal rights to citizens of the United States; *nor in any event * * * as to claimants other than citizens of the United States unless it arose with reference to the money or other property held by the Alien Property Custodian or Treasurer of the United States hereunder.*" (Italics ours).

It appears affirmatively from the stipulated facts which are admissions at least upon the part of the appellants, that their claims do not arise with reference to the money or to the property held by the Alien Property Custodian or Treasurer of the United States.

It appears that subsequently to the seizure by the Alien Property Custodian, executions upon these judg-

ments were issued out of the Surrogate's Court of Ulster County. The first of these executions was issued October 18, 1920.

Neither the docketing of the judgments on December 20, 1919 [R. 70 (5)] in New York County, nor the issuance of the executions effected any lien or charge upon the property which the Alien Property Custodian had already seized.

This conclusion has been asserted by the United States Circuit Court of Appeals, Second Circuit, in an appeal made by these same appellants upon the same judgments for leave to intervene in a suit in the United States District Court for the Eastern District of New York, entitled *Aronstam* v. *James*. Three opinions were rendered by the courts upon this application. They will be found reported under the title of *Aronstam* v. *James*, 273 Fed. 545; 273 Fed. 548 (being the two in the District Court), and 273 Fed. 688 (being the opinion of the Circuit Court of Appeals). In this latter opinion the Court says among other things:

> "Aronstam's suit is under section 9 of the Trading with the Enemy Act (Comp. St. 1918, Com. St. Ann. Supp. 1919 3115½*e*), and the funds of the respondent Mrs. James are in the treasury of the United States awaiting the determination of it. The petitioners had no lien upon these funds under section 1405 of the Code of Civil Procedure of New York, because they are not chattels nor subject to levy by execution."

So far as any point may be made by the appellants that the action of Mr. Justice Hoehling in denying a motion to dismiss the cause on motion, in some way determined the law of the case, we would call attention to the fact that the appellee James was not a party to this motion. The order denying the motion was entered October 20th, 1921, and her answer was not filed until November 22nd, 1921 (R. 13).

There is a suggestion in appellants' brief that appellee James' property was seized because she was an alien enemy. This is an error. Her property was sequestered because she was in enemy territory—Austria—although she was an American citizen. Her marriage to a German had been annulled prior to the seizure [R. 69 (2)]. In the Aronstam case she was not held to be an "alien enemy" but "to be an enemy within the meaning of the said Trading with the Enemy Act" (R. 77).

She did not apply to have her property returned under the section of the law referred to on page 4 of appellants' brief, because she could not, she was not at the time of the seizure of her property nor at the time of her application, the wife of a subject or citizen of Germany or Austria-Hungary. The suggestion that the sequestration was about to be lifted (appellants' brief, p. 4), finds no support in the record and the allegation contained in Record on page 42 at folio 74 is denied (R. 50). The stipulation (R. 72, p. 13), only states that this appellee has filed her claim for the return of her property.

II.

The Republic of France does not in like case extend reciprocal rights to citizens of the United States.

If this Court decides, as it is submitted it must decide, that the claims of the appellants herein do not arise with reference to the money or other property held by the Alien Property Custodian or the Treasurer, then this question as to the reciprocity granted by France to citizens of the United States in like case will not be reached. However, should this Court decide that these

claims do arise with reference to the money or other property held by the Custodian or the Treasurer, then the next obstacle met by the appellants is the fact that the Republic of France does not extend reciprocal rights to citizens of the United States.

That portion of Subsection (e) of Section 9 of the Trading with the Enemy Act (c. 241, 41 Stat. 980) which is material here is:

> No money or other property shall be returned nor any debt allowed under this section to any person who is a citizen or subject of any nation which was associated with the United States in the prosecution of the war, unless such nation in like case extends reciprocal rights to citizens of the United States.

This Court will take judicial notice of the fact that the Republic of France was associated with the United States in the prosecution of the war. It is alleged in the amended bill of complaint that the appellants herein are citizens of that country. Hence, the only other question which the Court must determine is whether or not the Republic of France, in like case, extends reciprocal rights to citizens of the United States. It must be apparent that whether or not France extends reciprocal rights to citizens of the United States is a question of French law. The French law is a fact which must be proved. There can be no question as to this. In *Ennis* v. *Smith*, 14 How. 399, at 425, this Court enunciated the rule as follows:

> The written foreign law may be proved, by a copy of the law properly authenticated. The unwritten must be by the parol testimony of experts. As to the manner of authenticating the law, there is no general rule, except this: that no proof shall be received, "which presupposes better testimony behind, and attainable by the party."

> They may be verified by an oath, or by an exemplification of a copy, under the great seal of a State, or, by a copy, proved to be a true copy by a witness who has examined and compared it with the original, or by a certificate of an officer, properly authorized, by law, to give the copy; which certificate must be duly proved.

The rule was further enunciated in *Pierce* v. *Indseth*, 106 U. S. 546, at 551, as follows:

> The general rule as to the proof of foreign laws is that the law which is written, that is, statute law, must be proved by a copy properly authenticated; and that the unwritten law must be proved by the testimony of experts, that is, by those acquainted with the law. *Ennis* v. *Smith*, 14 How. 400.

Of course, the burden of proving the French law was upon the plaintiffs in the courts below. At the first session of the hearing of the case, on February 15, 1923, the appellants attempted to prove the French law by proffering a letter dated December 11, 1922, to the Secretary of State of the United States, and signed "Jusserand"; upon objection, it was excluded by the Court. This letter is printed in full at the bottom of page 62 and on page 63 of the record, and exception is taken to its exclusion by the Court below. An examination of this letter will show that it does not purport to be a certificate as to the authenticity of a particular written law of France. It is rather a statement by M. Jusserand as to what the opinion of the political department of his government is, as to whether or not France extends reciprocal rights to citizens of the United States. This letter was clearly not admissible to prove the law of France within the rule laid down in the *Ennis Case* and the *Pierce Case, supra,* and was, therefore, properly excluded.

Had M. Jusserand been certifying as to a copy of the written law of France, the question might have been a different one. He was doing nothing of the sort. He is simply passing on to the Secretary of State what the political department of the French Government says is the French law. This was mere opinion testimony and would not be admissible.

In their insistence that the letter from M. Jusserand was proper evidence, counsel relied upon the case of *Church* v. *Hubbart*, 2 Cranch, 187, and they quote from the opinion of Chief Justice Marshall in that case.

The Chief Justice at that time recognized the well-established rule that foreign laws are facts which must be proved before they can be received in a court of justice, and he fully recognized the principle that the best testimony shall be required which the nature of the thing admits of, or in other words, that no testimony shall be received which presupposes better testimony obtainable by the party who offers it. The appellants grasp upon a single sentence in the opinion to justify their contention. This sentence is (p. 235):

> The sanction of an oath is required for their establishment, unless they can be verified by some other such high authority that the law respects it not less than the oath of an individual.

An examination of the decision in *Church* v. *Hubbart*, *supra*, will show that the question there arose not with reference to an opinion given by a foreign diplomatic officer as to what the political department of his government said the law of his country was at the particular time, but as to whether or not two edicts and judgments of sequestration of a Portuguese Court were properly authenticated. The edicts were certified by the American counsel at Lisbon, under his official seal, to be copies of the original law of the realm. Chief Justice Marshall, after discussing the rule for the proof of foreign laws,

excluded the edicts, holding that they were not properly proved by the certificate of the American consul. In the same case certain proceedings of a Portuguese Court were offered in evidence, with an English translation certified by the American consul to be correct. The proceedings of the Court were under the seal of his arms by a person who stated himself to be the Secretary of State for foreign affairs. The Court held that neither were admissible, since the seal of the Secretary of State for foreign affairs was not the public seal of the government, although the consul certified that the English copy accompanying the certificate of the Secretary of State for foreign affairs was a true translation of the Portuguese original.

Thus, an examination of the case relied upon by the appellants, together with an acceptance of the rule laid down in the *Ennis* and *Pierce cases*, will indicate clearly that the furthest courts will go in permitting foreign laws to be proved by a certificate is to permit a foreign written statute to be introduced into evidence, when properly certified, and that the courts are very particular as to the manner of such certificate. The courts will not permit a mere letter from a foreign ambassador stating what the political department of his government says is the law of his country to be introduced into evidence. In the present case the letter simply purports to be a letter from the French Ambassador to the Secretary of State. It is true that the State Department certified that this letter had been received and was in the possession of the State Department. This certificate of the State Department, however, has the force only of permitting a copy of the letter to be introduced into evidence without the production of the original, *if* the original itself is admissible into evidence. M. Jusserand's letter is not certified or sworn to in any manner. This disposes of the question as to the propriety of the ex-

clusion of the letter from M. Jusserand to the Secretary of State.

However, further reasons might be assigned as to why the letter was improper to prove the French law and was immaterial and irrelevant to this case. It will be noted that M. Jusserand states (R. 63):

> That in particular an American national holding a claim against a former enemy whose property was sequestered in France, *the validity of the claim having been acknowledged by judgment of a French Court,* may seek the execution of that judgment on the property coming under the sequestration up to the assets of the said sequestrated property. (Italics ours.)

This, of course, means nothing, since it must be determined what claims of American citizens would be recognized as valid by a French Court before it could be determined whether or not the claim would be recognized by France. The materiality of this will be understood when the evidence as to the French law, which was secured and which will be later discussed, is considered.

Furthermore, the appellants did not rely upon this letter for their proof, nor did they stand upon the exclusion. Subsequently the depositions of two French experts upon the French law were put in evidence. One was the deposition of Pierre Lepaulle taken on behalf of the defendants, Miller and White, and the other was the deposition of Rene Pellerin taken on behalf of the plaintiffs in the Court below. No objection whatsoever is raised to the qualifications of M. Lepaulle, and any doubt as to his qualification to testify as to the law of France is put at rest by an examination of those qualifications contained on pages 81 and 82 of the record.

The testimony of M. Lepaulle is quite clear as to the law of France under circumstances such as the present. The real question is whether or not the French Govern-

ment would permit an American citizen in the same situation as the appellants in this case to collect his debt out of the property of his enemy debtor, which property had been sequestered by the French Government. Although appellants in their brierf rely in a large measure upon M. Lepaulle's testimony in their discussion of the question, they consistently omit the real and determining portions of that testimony.

He unmistakably states that the law of France allows to citizens of the United States precisely the same rights with respect to collection of claims out of sequestered enemy property as it allows to its own citizens. (R. 90.) This leads to the question as to what rights the French law allows to French citizens, for under Subsection (e) of Section 9 of the Trading with the Enemy Act the appellants can have no greater rights than the law of France extends to American citizens in like cases.

A general principle laid down as to the French law by M. Lepaulle is:

> The general principle is that the German debtor must be sued where he has his domicile. So that the mere fact that he has property in France will not allow any creditor, even a French creditor, to sue the French Government in order to have his debt paid out of the property. This general principle is written in Article 296 of the Treaty of Versailles * * * and the law of March 10, 1920, which has been made to apply to Article 296 of the Treaty of Versailles. (R. 82.)

A further general principle:

> Now, from September 27, 1914, therefore, up to January 10, 1920, the French Government could not be sued under any circumstances whatever by any creditors of the German citizens whose property had been sequestrated. (R. 84.)

It is also quite clear that the French law does not permit creditors of enemies to secure the payment of debts out of sequestered property unless those debts arose prior to August 2, 1914. As to this M. Lepaulle says:

> This is something absolutely fundamental. That is, that only creditors, prior to the war of 1914, can get paid out of that property. If the date at which the debt had been contracted is a date later than the 2nd of August, 1914, there can be no way whatsoever for the creditor to recover the amount of the debt out of the Alien Property Custodian in France. * * * (R. 87.)
>
> No creditor whose debt has arisen after August, 1914, can sue the French Alien Property Custodian to have his debt paid out of the sequestrated property, no matter how it arose. If it is after August 2, 1914, that is the end of it. (R. 88.)

These general principles having been laid down, M. Lepaulle proceeds to show what debts may be paid out of property sequestered by the French Government. As indicated above, no debts could be paid until after January 20, 1920. (R. 88.) After that date the only debts payable were debts arising prior to August 2, 1914, and those debts must come within one of three categories. These three categories under the French law, as described by M. Lepaulle, are:

(1) Debts may be paid by the French Government out of sequestered property, if the debt is against a German who maintained his principal establishment in France before the war, and had left the territory of France at the beginning of hostilities. (R. 87 and 128.) M. Lepaulle in testifying as to this principle relied upon certain rules laid down in June, 1920, by the Minister of Justice. These are quoted in full on page 126 ff. of the record.

(2) Debts are payable by the French Government out of German sequestered property when the debt constitutes a mortgage, pledge, or lien, or special charge upon the particular property. (R. 87 and 128.)

(3) The above two mentioned categories are laid down in the circular of June 24, 1920. M. Lepaulle, however, stated that there was besides these now a third category of debts which are paid out of sequestered property. He says:

> The third exception has been worked on an equity basis by the administrative practice of the French Alien Property Custodian, and I have obtained that information from the officials of that Bureau in Paris. They will pay creditors prior to August 2, 1914, when the debt arose out of some work connected with the property situated in France. Suppose, for instance, a German having a chateau somewhere in France, and this German employed a gardener, this gardener has worked his garden for one year, his wages have not been paid. He has no lien on the property, and he has no mortgage of any sort. The German has not his principal establishment in France, so he could not sue the French Alien Property Custodian under the first or second exceptions. It is in the nature of an equitable lien which has been worked out in working out the French idea of liquidation. (R. 89.)

From the foregoing the rule as to the French reciprocity may be summarized as follows: France will extend the same rights with respect to sequestered property to citizens of the United States as it extends to its own citizens. Citizens of France can secure payment of debts out of sequestered property only when the debt arose prior to August 2, 1914. Having shown that the debt arose prior to August 2, 1914, it must be further shown that the debt comes within one of three categories:

(1) It must be a debt against a German whose principal establishment was in France prior to the war; or

(2) It must be a debt which constitutes a mortgage, pledge, or lien upon the sequestered property; or

(3) The debt must have arisen because of some act or performance of the creditor with respect to the property.

It is quite clear that the claims of the appellants do not come within the category of claims permitted to be paid by France out of sequestered property. Even assuming that the claim of the appellants arose prior to August 2, 1914, nevertheless the claim has not been brought within one of the three categories. The appellants' claims are not claims against an enemy whose principal establishment was in the United States, nor does it constitute a mortgage, lien, or pledge upon the property, nor does it arise by reason of some service performed with respect to the property. Hence, it has not been shown that France, in like case, extends reciprocal rights to citizens of the United States.

Appellants in their brief assert that the lower Court committed error in excluding certain evidence which would show that the appellants' claim arose prior to August 2, 1914. The appellants' judgment here was secured in 1915. It is true that M. Lepaulle testified that the French law would look to the time the original debt arose. Relying upon this statement of M. Lepaulle, the appellants assert that the Court erred in excluding the testimony which would show that the original debt arose prior to August 2, 1914. Thus appellants say they were deprived of the right to show that their claim fell within the third exception made by M. Lepaulle.

Here again appellants have misconstrued M. Lepaulle's testimony. The testimony of M. Lepaulle was not that any debt arising prior to August 2, 1914, was payable out of sequestered property in France, but that

any debt in order to be paid must not only have arisen prior to August 2, 1914, but further that it must fall within one of the three categories which have been mentioned above. Even though appellants' original claim may have arisen prior to August 2, 1914, under no conceivable construction could it have been held to come within one of the three exceptions made by M. Lepaulle. Hence the evidence which was excluded and which was proffered solely to show that the claim arose prior to August 2, 1914, became immaterial and irrelevant, since even though it was shown that the claim arose prior to August 2, 1914, it was not shown that the claim came within one of the three categories.

The conclusions of the trial court on this point appears on pages 136, 137, 138 and 143 of the record, and are as follows:

> "I hold, as a matter of fact, that in a case of this kind there was no reciprocity, because as I read the testimony of the two French experts, I believe it is the law of France, and they testify to it, that American citizens could not go to France now and establish—not file; anybody can file a claim—but could not go and establish a claim on these facts against the sequestered property in France."

And after reviewing the testimony of M. Lepaulle and M. Pellerin, the two experts on French law, the Court continued:

> "So, I find as a fact that while the law of France is that an allied—I suppose we have to call ourselves an 'associated' power—while the citizen of an allied or neutral power has exactly the same rights in the French courts as a Frenchman has, to that extent there is reciprocity, I do not think there is any power in the French Court to let a French citizen recover under those circumstances. In other words, there isn't any reciprocity as to the particular thing that we have under consideration here."

The statement on page 5 of appellants' brief is not complete because the defendant James raised the question as to the accord of reciprocal rights by the Government of France. Issue was duly taken on these allegations in her answer (par. XI, R. 34).

Appeal of David Keane, Receiver, No. 55.

Summary of Argument.

The appeal should be dismissed, because:

1. Keane as Receiver has no greater rights than the judgment creditors on whose petition he was appointed, and being citizens of France, their rights are limited by two requirements of Subdivision (e) of Section 9 of that Act (neither of which is met):

   (a) that the claim must have risen with respect to the property in the hands of the Custodian; and

   (b) as to reciprocity.

2. To allow Keane as Receiver to urge any claim against the property of Mme. James in the hands of the Alien Property Custodian would violate Subdivision (f) of Section 9 of the Trading with the Enemy Act, which exempts property in the hands of the Custodian from outside judicial interference.

3. The debt asserted by Keane as Receiver was neither owing to nor owned by the claimant prior to October 6, 1917, as required by Subdivision (e) of Section 9, irrespective of the residence or nationality of the claimant.

4. Keane as Receiver, under Section 777 of the New York Civil Practice Act, takes no title to property in the hands of the Custodian, for it is exempt from execution.

5. The denial of a motion to intervene is interlocutory and is not appealable unless the third party would otherwise be left remediless which has not been suggested here.

6. Keane, a receiver in supplementary proceedings appointed in the State of New York, cannot maintain an action in the Supreme Court of the District of Columbia.

The application of the Receiver David Keane, appellant, for leave to intervene in the pending action and the motion of appellants to bring him in as a party were properly denied.

It appears that by an order of a Justice of the Supreme Court of the State of New York, made on the 18th day of June, 1923, in the matter of the proceedings instituted by George Pratt De Gasquet James, as judgment creditor, David Keane was appointed receiver in proceedings supplementary to execution on the judgment recovered by the said George Pratt De Gasquet James, which judgment is the basis of the present suit, so far as he is concerned (R. 43).

By order of the County Judge of Oneida County, New York, in proceedings supplementary to execution instituted by Pauline Andree de la Mettrie, as judgment creditor, this receivership was extended to that proceeding. The order was made on the 28th day of July, 1923, and it was based upon the judgment set out by the appellant, de la Mettrie, as the basis of her suit in the case at bar (R. 45).

Both of these orders were made in what is known as third party proceedings—that is to say, were entered in proceedings instituted against persons supposed to have in their possession property of the judgment debtor. It is recited in the first order that the judgment debtor was not served with notice of the application of the order be-

cause she was not in the State of New York and now resides and has for many years resided in Europe (R. 44). A similar recital is made in the order of the County Judge (R. 45).

The denial of the intervention of the receiver may be supported upon either one of six grounds; each of the first five would prevent intervention even in a Federal court sitting in the State of New York:

(1) In the first place, such intervention even in New York would violate Subdivision (e) of Section 9 of the Trading with the Enemy Act (C. 241, 41 Stat. 980). A New York receiver in supplementary proceedings has no greater right to the property of the judgment debtor than the creditor on whose petition he was appointed.

Kennedy v. *Thorp*, 51 N. Y. 174 (1872).

See also

Boucker v. *Callahan*, 218 N. Y. 321, at p. 324.

The two judgment creditors, Pauline de la Mettrie and George Pratt de Gasquet James, on whose petition the appellant Keane was appointed receiver, were, at the date of asserting the debt, and still are, admittedly citizens of France (Rec., fol. 122, pp. 68, 69). We have already shown (*supra*, pp. 6 to 20) the judgment creditors are unable to meet two requirements of Subdivision (e) of Section 9 of the Trading with the Enemy Act (C. 241, 41 Stat. 980) applicable to them, namely:

1. that the debt must have arisen with reference to the money or property in the hands of the Custodian or the Treasurer of the United States; and

2. that the nation of which the claimant is a citizen shall extend reciprocal rights to citizens of the United States.

Since the judgment creditors, on whose petition Keane, the Receiver, was appointed, are unable to assert such rights, the Receiver himself cannot do so—for he stands in their shoes. Therefore, the petition of the Receiver for intervention must be denied. Any other conclusion would be but a sign post to a highway leading to the constant evasion of Subdivision (e) of Section 9 of the Trading with the Enemy Act, would render its prohibitions wholly nugatory, and would permit to be accomplished indirectly what is directly forbidden.

(2) Secondly, the intervention of Keane as Receiver in supplementary proceedings would be directly in the teeth of Subdivision (f) of Section 9 of the Trading with the Enemy Act.

Under the New York Statute it is true that a receiver in supplementary proceedings takes the legal title to all the personal property of the debtor, as well as the right to recover by judicial process property transferred by the judgment debtor in fraud of creditors; he is the receiver of the property of the judgment debtor, not of the judgment creditor.

Ward v. *Petrie*, 157 N. Y. 301, 307, 309 (1898).

But any action by the receiver to recover property of the judgment debtor is merely one step towards execution upon it in satisfaction of the judgment of the creditor on whose petition the receiver is appointed.

If Keane as Receiver be allowed to intervene and to charge any of the property in the hands of the Custodian with the judgment owned by the creditors on whose petition he was appointed, such intervention will be granted purely in aid of such judgment by way of execution upon the property of the defendant James in the hands of the Alien Property Custodian.

Mulstein Co. v. *City of New York*, 213 N. Y. 308, at p. 314.

Furthermore, any money or property paid or transferred to Keane as Receiver would be held by him subject to the order of the New York courts which appointed him. But Subdivision (f) of Section 9 of the Trading with the Enemy Act (C. 241, 41 Stat. 980) provides,

> "(f) Except as herein provided, the money or other property conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian, shall not be liable to lien, attachment, garnishment, trustee process, or execution, *or subject to any order or decree of any court.*" (Italics ours.)

The proposed intervention of the Receiver must therefore be denied upon this additional ground.

(3) The receiver in any event was not vested with title to any claim prior to the date of the first order appointing him receiver—that is to say, June 18, 1923.

Section 9, subdivision (*e*), of the Trading with the Enemy Act provides that no matter who the claimant may be, the debt asserted must "be owing to and owned by the claimant prior to October 6, 1917." Inasmuch as the claim in question was not owned by the receiver prior to the date mentioned, he could not assert any rights in this Court based on such a claim.

(4) Under the New York Statute, the receiver in supplementary proceedings takes no title to property exempt from levy and sale under an execution.

Section 777 of the Civil Practice Act of New York (formerly Section 2463, Code of Civil Procedure) provides:

> "This article (relating to Proceedings Supplementary to Execution) does not authorize the seizure of, or other interference with, any property which is expressly exempt by law from levy and sale by virtue of an execution."

The property involved in the present case is expressly exempt from levy and sale under an execution under subdivision (*f*) of Section 9 of the Trading with the Enemy Act (*supra*, p. 24).

(5) An order denying leave to intervene is interlocutory and is not appealable.

It is settled law that generally the denial of a petition for leave to intervene is an exercise of discretionary power. It is not final in its character and is not appealable.

> *Credits Commutation Co.* v. *United States*, 177 U. S. 311;
> *Ex parte Cutting*, 94 U. S. 14.

While the general rule is subject to the exception that a denial of a motion to intervene may be appealable if it leaves a third party remediless, it is nowhere suggested in appellants' brief that such a result would follow in the case at bar.

(6) The receiver in supplementary proceedings appointed in New York State cannot maintain an action in the Supreme Court of the District of Columbia.

The leading case among the Federal decisions is that of *Booth* v. *Clark* (1855), 58 U. S., 322, in which it was held that a receiver appointed under a creditor's bill in the State of New York, could not sue in the United States Circuit Court for the District of Columbia. The court said at page 167:

> "Whatever may be the operation of the decree in respect to the receiver's powers over the property of the debtor within the State of New York, and his right to sue for them there, we do not find anything in the cases in the New York Reports showing the receiver's right to represent the creditor or creditors of the debtor in a foreign jurisdiction. It is true that the receiver in this case

> is appointed under a statute of the State of New York, but that only makes him an officer of the court for that State. He is a representative of the court, and may, by its direction, take into his possession every kind of property which may be taken in execution, and also that which is equitable, if of a nature to be reduced into possession."

There was added by what is now known as the Code of Procedure of New York, the first part of which was adopted in 1848, a chapter which was entitled Proceedings Supplementary to Execution, which provided a substitute for the bill in chancery. The various provisions of the code authorizing these proceedings were to be considered as a scheme to take the place of the former bill in chancery (*I. & T. N. Bank* v. *Quackenbush*, 143 N. Y. 567, 573).

In the case of *Lynch* v. *Johnson*, 48 N. Y., 27, it was stated that:

> "Proceedings under Sections 292 and 294 of the Code are parts of the same scheme for the collection of debts inaugurated by the Code. These sections furnish a simple substitute for the creditor's bill, as formerly used in Chancery."

The nature of the proceedings supplementary to execution and the position of a receiver therein under the provisions of the statutes of New York have been described in various ways. In the case of *Mulstein Co.* v. *City of New York*, 213 N. Y., 308, at page 314, the court said:

> "The issuing of an execution upon a judgment is a proceeding in the suit, and so are the proceedings supplementary thereto (*Wegman* v. *Childs*, 41 N. Y., 159; *Ward* v. *Roy*, 69 N. Y., 96). Those decisions, it is true, were made prior to the passage of said Section 2433 of the Code of Civil Procedure. None the less I think that as far as the question before us is concerned, the proceeding

> though for some purpose a special proceeding, is still but supplementary to the execution and in aid of the judgment."

Again in *Matter of Boucker Co.* v. *Callahan Co.*, 218 N. Y., 321, at page 324, the Court said:

> "A receiver appointed under the General Corporation Law acts for the benefit of all the creditors of the corporation, who are thus assured that no one will acquire a preference over any other in the distribution of its assets; whereas a receiver in supplementary proceedings represents only the creditor who procured his appointment and such others as may have caused the receivership to be extended to their claims, each becoming entitled to payment in full in the order of diligence."

The receiver in this present case, therefore, occupies no better position than the receiver in the case of *Booth* v. *Clark*.

The case of *Booth* v. *Clark* has been uniformly followed in the Supreme Court of the United States. See the case of *Sterrett* v. *Second National Bank*, 248 U. S., 74, at page 76.

The cases in which the courts of the United States have recognized the right of a foreign receiver to sue in the Federal Courts have been cases of statutory receivers of corporations or analogous instances. We have been unable to find and we do not believe that there is an instance in which the receiver of an individual, appointed in proceedings supplementary to execution or under a creditor's bill, by virtue of his appointment has been allowed to maintain an action in a Federal court. The only method in which rights can be asserted in those courts are by the original creditors and not by the receivers.

In the foregoing argument we have included everything contained in our brief in the Court of Appeals of

the District of Columbia in reference to the receiver's power to sue outside the State of New York. A consideration will show that the criticism made by appellants at the bottom of page 59 of their brief must be due to misunderstanding of an argument.

CONCLUSION.

The decree of the Court of Appeals of the District of Columbia affirming the decree dismissing the bill of complaint of the appellants in No. 54 and the order denying the motion of the receiver to intervene in No. 55 should be affirmed.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1926

No. 54

PAULINE ANDRE DE LA METTRIE AND GEORGE PRATT de Gasquet James, Appellants

v.

ELIZABETH PRATT DE GASQUET JAMES, HOWARD Sutherland, as Alien Property Custodian, et al.

No. 55

DAVID KEANE, RECEIVER, APPELLANT

v.

ELIZABETH PRATT DE GASQUET JAMES, HOWARD Sutherland, as Alien Property Custodian, et al.

APPEALS FROM THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

BRIEF ON BEHALF OF HOWARD SUTHERLAND, AS ALIEN PROPERTY CUSTODIAN, AND FRANK WHITE, AS TREASURER OF THE UNITED STATES

OPINION BELOW

The opinion of the Court of Appeals of the District of Columbia in these cases is reported in 6 F.

(2d) 479. It appears in the transcript of record at page 145.

JURISDICTION

The judgments of the Court of Appeals of the District of Columbia were entered March 2, 1925. (R. 147.)

The appeal to this Court in case No. 54 has been prosecuted pursuant to paragraph sixth of Section 250 of the Judicial Code (c. 231, 36 Stat. 1159). In case No. 55 appellant insists that the appeal is prosecuted pursuant to the provisions of Section 250 of the Judicial Code (c. 231, 36 Stat. 1159), but these appellees will urge that the Court is without jurisdiction to entertain the appeal in that case. See post, page 12.

CASE NO. 54—APPEAL OF METTRIE AND JAMES

QUESTION PRESENTED

This appeal presents the question whether the appellants, citizens of the Republic of France, may, under Section 9 of the Trading with the Enemy Act, as amended June 5, 1920, collect certain claims against the appellee Elizabeth James from property of said appellee held by the Alien Property Custodian.

STATEMENT OF THE CASE

The appellants are citizens and residents of the Republic of France. (R. 2.)

On March 21, 1915, a final decree and judgment in their favor against the appellee James was entered

in the Surrogate's Court of Ulster County, New York, which decree and judgment after modification and affirmance upon appeal was resettled and entered in the office of the Surrogate on November 3, 1917. Said judgment was docketed in the office of the Clerk of the City and County of New York on December 20, 1919. (R. 3.) The first execution thereon issued October 18, 1920. (R. 4.)

On November 5, 1918, the Alien Property Custodian seized and took into his possession certain property of the defendant James then in the hands or under the control of the Farmers Loan and Trust Company of the City of New York. (R. 3-4.)

The amended bill of complaint does not allege, and no evidence was adduced even tending to show that the judgment forming the basis of appellants' claim or the debt upon which recovery was sought was in any way connected with the money and other property seized by the Alien Property Custodian; in fact, it appears from a stipulation between the attorney for the appellants and the attorney for the appellee James, which was put in evidence by the attorney for the appellants (R. 68), that the claim of the appellants against the appellee James grew out of the settlement of her accounts as executrix of the estate of her deceased husband (R. 70), while the money and other property seized by the Alien Property Custodian consisted of income from a voluntary trust created by the appellee

James years before the death of her husband (R. 69, 71).

After applications to the Alien Property Custodian for the allowance of their claims, which were disallowed, the appellants brought this suit in equity in the Supreme Court of the District of Columbia in July, 1921, claiming to sue under Section 9 of the Trading with the Enemy Act as amended June 5, 1920 (C. 241, 41 Stat. 977), and seeking satisfaction of their claim against the appellee James out of the money and other property seized as belonging to her by the Alien Property Custodian. (R. 2–6.)

The Supreme Court of the District, after evidence had been submitted, entered a final decree dismissing the bill of complaint. (R. 16–17.) The Court of Appeals of the District of Columbia affirmed the decree of the Supreme Court. (R. 147.)

SUMMARY OF ARGUMENT

The appellants, being citizens of France, are precluded by Subsection (e) of Section 9 of the Trading with the Enemy Act (41 Stat. 977, 980), from recovering in this action because:

The debt upon which recovery is sought did not arise "with reference to the money or other property held by the Alien Property Custodian or Treasurer of the United States."

No evidence proffered by the appellants was improperly excluded. Excluded evidence offered to show that appellee James is a citizen of the United States, and that her claim to the property in the hands of the Alien Property Custodian has been or was to be allowed, was irrelevant, as the outcome of the case could not have been affected by proving these facts. The United States has prohibited any suit against the Custodian as garnishee or otherwise except under the conditions specified in Section 9 of the Act.

ARGUMENT

I

THE DEBT ALLEGED TO BE OWING TO THE APPELLANTS DOES NOT ARISE "WITH REFERENCE TO THE MONEY OR OTHER PROPERTY HELD BY THE ALIEN PROPERTY CUSTODIAN OR TREASURER OF THE UNITED STATES" WITHIN THE MEANING OF THE TRADING WITH THE ENEMY ACT, AS AMENDED

The question whether the claims of the appellants arose with reference to the money or other property out of which they seek to have it paid, arises by reason of the provisions of Section 9 of the Trading with the Enemy Act as amended June 5, 1920 (c. 241, 41 Stat. 977). Subsection (a) of Section 9 as so amended provides, in so far as material to this case:

> That any person not an enemy or ally of enemy * * * to whom any debt may be owing from an enemy or ally of enemy whose property or any part thereof shall have been conveyed, transferred, assigned, delivered,

> or paid to the Alien Property Custodian or seized by him hereunder and held by him or by the Treasurer of the United States may * * * institute a suit in equity in the Supreme Court of the District of Columbia * * * to establish the * * * debt so claimed, and if so established the court shall order the payment, * * * to said claimant of the money or other property so held by the Alien Property Custodian or by the Treasurer of the United States * * *.

Subsection (e) of Section 9 (c. 241, 41 Stat. 980) provides:

> No money or other property shall be returned nor any debt allowed under this section to any person who is a citizen or subject of any nation which was associated with the United States in the prosecution of the war, unless such nation in like case extends reciprocal rights to citizens of the United States; nor in any event shall a debt be allowed under this section unless it was owing to and owned by the claimant prior to October 6, 1917, and as to claimants other than citizens of the United States unless it arose with reference to the money or other property held by the Alien Property Custodian or Treasurer of the United States hereunder.

This Court has held that Subsection (e) is a limitation upon the general provisions of Subsection (a) of Section 9. (*Banco Mexicano* v.

Deutsche Bank, Miller, as Alien Property Custodian, 263 U. S. 591.)

It is alleged in the bill of complaint that the appellants here are citizens of the Republic of France. In order for them to secure a recovery of their alleged indebtedness they must show that that indebtedness arose *with reference to the money or other property* held by the Alien Property Custodian or the Treasurer of the United States.

This Court defined a debt which arises with reference to money or other property held by the Alien Property Custodian or the Treasurer of the United States, in the case of *Banco Mexicano* v. *Deutsche Bank, Miller, as Alien Property Custodian, supra*, as—

> *A debt that had fixed some right or title or equity to the money or other property held by the Alien Property Custodian or by the Treasurer of the United States* (page 601). (Italics ours.)

This suit is upon a judgment recovered on March 21, 1915, and resettled in accordance with a judgment of the Court of Appeals of New York on November 3, 1917.

The property and money out of which appellants desire payment of their alleged indebtedness was seized by the Alien Property Custodian on November 5, 1918.

It was not until December 20, 1919, that the appellants' judgment was docketed in the office

of the Clerk of the City and County Court of New York, and it was not until October 18, 1920, almost two years after the seizure by the Alien Property Custodian and almost three years after the resettling of the judgment, that the first execution was issued out of the Surrogate's Court. There is nothing in the record, and no effort was made, to prove that the judgment, as resettled on November 3, 1917, had any connection whatsoever with the property afterward seized by the Alien Property Custodian, which was then held by the Farmers Loan & Trust Company.

Appellants seek to distinguish the present case from the *Banco Mexicano case* by saying that in this case the Government is a mere stakeholder, because if the present suit is terminated unfavorably to the appellants the Government will release the property in question to the appellee, Madame James, and they allege that, as a matter of fact, Madame James is endeavoring to secure release of the property out of which appellants seek to recover in order to avoid the payment of her just obligations.

The question whether or not Madame James would be entitled to secure the property here in question were this suit not pending, was not before the court for decision.

The theory of the appellants seems to be that the provisions of Section 9 of the Act, prescribing the conditions under which suits may be brought to satisfy claims out of money in the hands of the

Custodian, only apply to property which is being retained by the Custodian, and not to property ordered released, and as to that, any creditor of the person entitled to the return of the property may by garnishment, creditor's bill, or otherwise, attach the property in the hands of the Custodian. Subsection (f) of Section 9 provides "Except as herein provided the money or other property * * * delivered, or paid to the Alien Property Custodian, shall not be liable to lien, attachment, garnishment, trustee process, or execution, or subject to any order or decree of any court." No distinction is made in the statute between property the Custodian has a right to retain and that which he is obliged to return. The purpose of the statute, among other things, was to prevent the Custodian from being troubled by garnishments, trustee process, or other like proceedings. So long as he still retains possession, no such suit may be maintained. Creditors of the owners of the property must wait until it leaves the possession of the Custodian before attempting to seize it to satisfy their claims, unless they bring their case under Section 9.

II

NO EVIDENCE PROFERRED BY THE APPELLANTS WAS IMPROPERLY EXCLUDED

Appellants assigned as error the exclusion of certain other evidence by the court at the hearing.

(1) The court excluded certain documents produced in court by the special assistant to the At-

torney General who was defending the case. (R. 64–68.) These documents constituted the entire files of the Attorney General and Alien Property Custodian on the subject of the claim of the appellee James to the return of the property.

It does not appear what these papers were, except that they included correspondence between officers of the United States relating to the matter.

The purpose of the offer of all these documents by appellants, as stated in their brief (page 45), and in the record, was to show the status of the appellee James as an American citizen and to show that her claim to the property had been allowed and the property about to be delivered to her.

It is immaterial for this case whether Madame James was a citizen of the United States or an alien, or whether her claim to the return of the property had been allowed, and the evidence was immaterial for that reason. The United States may not be sued without its consent, as a garnishee or otherwise, and the only consent it has given with respect to property in the hands of the Alien Property Custodian is that contained in Section 9, as amended.

It is also obvious from the record that no proper offer of any document was made and that much of the contents of the files must have been wholly irrelevant to the points sought to be proved, and their offer as a whole was properly rejected.

CASE NO. 55—APPEAL OF DAVID KEANE, RECEIVER

QUESTION PRESENTED

This case presents the question whether the decree of the Court of Appeals of the District of Columbia affirming an order which denied leave to intervene to a receiver of the property of the appellee James is reviewable by this Court, and if so, whether such decree was proper.

STATEMENT OF THE CASE

On June 18, 1923, almost two years after the institution of this suit, upon the motion of J. Noble Hayes, attorney for the appellants in case No. 54, an order was entered in the Supreme Court of the State of New York appointing one David Keane receiver of all the property, debt, equitable interests, rights and things in action, effects and estate, real and personal, of Elizabeth Pratt de Gasquet James, one of the appellees in this case, as judgment-debtor of the appellants, said order being entered in proceedings supplemental to execution. (R. 43–45.) On September 21, 1923, a motion was filed in this case which asked that the said receiver be permitted to intervene in the proceedings and file his petition. (R. 35–43.) The petition of David Keane is verified by Mr. Hayes, attorney for the appellants in case No. 54. (R. 43.) The object, as will appear from the petition (R. 36, 37), was to enable the receiver to secure the delivery to him of the property of Madame James.

At the hearing of the cause the motion of the receiver to intervene was presented by counsel for the appellants in case No. 54, and after full hearing, was denied. (R. 54.) The Court of Appeals of the District of Columbia affirmed the decree of the Supreme Court of the District denying the motion for leave to intervene. (R. 147–148.)

SUMMARY OF ARGUMENT

The appeal in case No. 55 should be dismissed because it is an appeal from an interlocutory order denying leave to intervene.

Furthermore, permitting the receiver to intervene in this case would be in contravention of the specific provisions of Subsection (f) of Section 9 of the Trading with the Enemy Act, under which this suit is brought (c. 241, Stat. 980).

ARGUMENT

I

THE APPEAL IN CASE NO. 55 IS FROM AN INTERLOCUTORY ORDER AND SHOULD BE DISMISSED

The Court of Appeals of the District of Columbia, from whose decree, affirming the order denying leave to intervene, this appeal is taken, under Section 226 of the Code of Laws of the District of Columbia has jurisdiction in its discretion to entertain appeals from interlocutory orders.

That the Court of Appeals passed upon the merits of the receiver's application for leave to intervene, is therefore no evidence that the affirm-

ance of the denial of such application was a final order reviewable by this Court under Section 250 of the Judicial Code.

This Court has repeatedly held that an application for leave to intervene is addressed to the discretion of the court and that an order denying leave to intervene is not such a final order as to furnish the basis for an appeal. *Guion* v. *Liverpool, London & Globe Insurance Co.*, 109 U. S. 173; *Credits Commutation Co.* v. *United States*, 177 U. S. 311; *Ex parte Cutting*, 94 U. S. 14; *City of New York* v. *Consolidated Gas Company*, 253 U. S. 219. This general rule is subject to the limitation that where a third party seeking to intervene will be remediless, unless permitted to do so, he may have an absolute right to intervene and an order denying this right may be appealable. *Credits Commutation Co.* v. *United States supra; Richfield Oil Co.* v. *Western Machinery Co.*, 279 Fed. 852.

It is clear that in the present case the denial of the receiver's petition for leave to intervene did not leave him without a remedy and that the affirmance of such denial by the Court of Appeals is not reviewable by this Court. The receiver was appointed in supplemental proceedings in aid of the enforcement of the judgments obtained by the appellants in case No. 54 against the appellee James, and his petition for leave to intervene expressly states that it is his duty to apply the property of the appellee James to payment of the judgments

of the appellants in case No. 54 and to turn over any balance to the judgment debtor. (R. 41.) If the appellants in case No. 54 should succeed in obtaining the application of the funds held by the Alien Property Custodian to satisfaction of their claim the purpose of the receiver would be accomplished and his intervention would be unnecessary. If the appellants in case No. 54 do not succeed, the receiver may assert any rights to the property which he may have in a new proceeding under Section 9 of the Trading with the Enemy Act as amended by the Act of March 4, 1923 (C. 285, 42 Stat. 1511).

II

THE APPELLANT IN THIS CASE HAS NO STANDING UNDER SECTION 9 OF THE TRADING WITH THE ENEMY ACT

The suit into which the appellant in this case sought to inject himself was instituted under Section 9 of the Trading with the Enemy Act as amended. Subsection (f) of Section 9 provides (c. 241, 41 Stat. 980):

> Except as herein provided, the money or other property conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian, shall not be liable to lien, attachment, garnishment, trustee process, or execution, *or subject to any order or decree of any court.* (Italics ours.)

In the light of this provision of Section 9 the Supreme Court of New York could not make David Keane the receiver of any property while in the

possession of the Alien Property Custodian or the Treasurer of the United States, nor place a receiver in any better position than the creditors he represents.

CONCLUSION

The judgments of the Court of Appeals of the District of Columbia should be affirmed.

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NOVEMBER, 1926.

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